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TRANSCRIPT OF RECORD.

163-81

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 174.

S. LOWE, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED OCTOBER 7, 1892.

(15,165.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 1, 1895.

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1 UNITED STATES OF AMERICA, } ss:
State of Kansas, }

To the Hon. A. H. Horton, chief justice of the supreme court of the State of Kansas:

Your petitioner, S. Lowe, who is — citizen of the State of Kansas, respectfully represents that at the January term, A. D. 1891, of the said supreme court of the State of Kansas, in a certain cause entitled "In the matter of the appeal — S. Lowe, prosecuting witness, from the judgment against him for costs in The State of Kansas *vs.* F. Keifer," this petitioner being the same S. Lowe, judgment was rendered against him, and that this judgment is rendered by the court of final appellate jurisdiction within and for said State of Kansas.

Your petitioner further states that the proceeding and judgment aforesaid so had involve the validity of certain statutes of said State, the said S. Lowe claiming that said statutes are in violation of the Constitution of the United States, and the said judgment of the said supreme court of the State of Kansas was in favor of the validity of said statutes, as appears by the certified record of said supreme court herewith exhibited.

Your petitioner therefore prays that upon an inspection of the record he be granted a writ of error to the Supreme Court of the United States in said cause in order that the error, if any, in the proceedings and judgment of said supreme court of Kansas may be corrected.

M. B. LIGHT,
Attorney for S. Lowe.

2 [Endorsed:] 7236. Petition for writ of error. Filed Mar. 12, 1892. C. J. Brown, clerk sup. court.

3 In the Supreme Court of the State of Kansas.

In the Matter of the Appeal of S. LOWE, Prosecuting Witness, from the Judgment against Him for Costs in the Case of The State of Kansas *vs.* F. Keifer.

Be it remembered that on the 12th day of December, A. D. 1890, there was filed in the office of the clerk of the supreme court of the State of Kansas a bill of exceptions and transcript of the record of the district court of Elk county, in the State of Kansas, with notices of appeal endorsed thereon, a full copy of which, with the exception of the testimony of witnesses attached thereto, is in the words and figures as follows, to wit:

4 In the District Court of the County of Chautauqua and State of Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
F. KEIFER, Defendant. } Information.

In the name and by the authority and in behalf of the State of Kansas I, J. V. Beekman, county attorney in and for the said county of Chautauqua, come now here and give the court to understand and to be informed that on the 23rd day of August, 1889, at and within the said county of Chautauqua and State of Kansas, the above-named defendant, F. Keifer, then and there unlawfully, wilfully, and maliciously intending and contriving to defame one Sandy Lowe, and provoke him to wrath and expose him to public hatred, contempt, and ridicule, and to deprive him of the benefits of public confidence and social intercourse, and to scandalize and to provoke him, did then and there unlawfully and wilfully and maliciously make, compose, publish, and circulate of and concerning said Sandy Lowe the following false, malicious, defamatory, and scandalous letter, writing, and communication, to wit:

"Office of F. Keifer, dealer in general merchandise and shipper of produce.

PERU, KANSAS, *August* 23, 1889.

Mr. W. J. Riggs, Cedarvale, Kas.

DEAR SIR: Yours at hand. In reply will say that Capt. Lowe has no friends in this part of the Co.; don't know of a man that will vote for him. He may run well where he is not known. He is rough, overbearing, and has trouble with everybody he has dealings with, & also with his own family. The general talk here is that he whipped his wife on her death-bed, & that marks were on her body when she was buried. He had to run away from Mo.; been in jail in Mo. I think we have plenty of good men in this Co. for sheriff without taking up such a man as Capt. Lowe. He has no education. Now, Mr. Riggs, I will refer you to his neighbors, Herbert Miller or Joe Foltz—Mrs. Foltz helped dress Mrs. Lowe when she was buried—or his own children.

Yours truly, F. KEIFER.

That said defendant, F. Keifer, did then and there unlawfully and maliciously make, compose, circulate, communicate, deliver, and cause the said libelous, defamatory, and scandalous letter and writing to be read and otherwise communicated to one W. J. Riggs and divers other persons, and did then and there and thereby unlawfully, wilfully, and maliciously slander, defame, and scandalize the said Sandy Lowe, and did then and there and thereby unlawfully and maliciously provoke him, the said Sandy Lowe, to wrath and expose him to public hatred, contempt, and ridicule, and did then and there and thereby deprive him, the said Sandy Lowe, of the benefits of public confidence and social intercourse, contrary to

the form of the statutes in such cases made and provided and against the peace and dignity of the State of Kansas.

J. V. BEEKMAN,
County Attorney.

STATE OF KANSAS, }
Chautauqua County, } *ss:*

Sandy Lowe, being duly sworn, says that the allegations
5 and averments contained in the foregoing information are true.

SANDY LOWE.

Subscribed and sworn to before me this 28th day of September, 1889.

[SEAL.] H. P. MOSER, *Clerk.*

STATE OF KANSAS, }
Chautauqua County, } *ss:*

I, H. P. Moser, clerk of the district court of Chautauqua county, Kansas, do hereby certify the above and foregoing to be a true, full, and correct copy of the original information in the above-entitled cause as the same appears on file in my office.

[SEAL] H. P. MOSER,
Clerk District Court, Chautauqua County, Kansas.

STATE OF KANSAS }
vs. } Information.
F. KEIFER. }

Witnesses for State: W. J. Riggs, J. R. Marsh, G. W. Arnold, Mrs. Joe Foltz, Mrs. Emma Shaw, Mary Dickenson, L. Batson, Mary A. Batson, Thos. M. Lowe, Geo. Lowe, James Thomas, J. J. Adams, G. G. Shirk, W. C. Narrow.

Witnesses for State endorsed by R. H. N.: W. I. Carmikle, W. O. Wilson, A. W. Roberts, J. T. Riley, Sam. Hartsell, Frank Floyd, V. Y. McGrew, Harlen Dixen, Wm. Lowe, Sarah Roberts, Jockie Jones, Walt Bessie, Ed. Stone, Wesley Stone, Sam. Shirk, Hugh Taylor, Joseph Lonsdale, J. F. Riley.

Witnesses endorsed: John Davidson, J. F. Conner, —— Houston, T. J. Mitchell, W. M. Coverntry, Darestowe, Oeshie Batson, Rebecca Lowe, W. A. Price, N. Ferguson, Wm. Gill, Dick McDow, Nelson McDole, Dr. C. B. Lipple.

6 STATE OF KANSAS, }
Chautauqua County, } *ss:*

13th Judicial District.

Be it remembered that on this 26th day of November, 1889, the same being the 13th judicial day of the regular November term in the year 1889 of the district court of the 13th judicial district of the State of Kansas, sitting in and for Chautauqua county, court

convened pursuant to adjournment, there being present the Honorable M. G. Troup, sole presiding judge of said court; H. P. Moser, clerk of said court, and J. J. Adams, sheriff of said county; whereupon the following proceedings were had:

In the District Court of Chautauqua County, State of Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
FRED. KEIFER, Defendant.

Now, on this 26th day of November, 1889, this cause comes on for hearing in its regular order, the plaintiff appearing by J. V. Beekman, county attorney, and J. D. McBrian, associate counsel, and the defendant, by his attorney, John W. Shartel. The defendant, by his attorney, moves the court to quash the information herein filed, and the court, after listening to argument of counsel and being fully advised in the premises, overrules said motion.

The defendant presents his petition to the court, asking that the venue on trial of this cause be changed to some other county.

Defendant's petition for a change of venue being read to the court, and the petition being supported by affidavits, and the State not offering any resistance to said petition, and the court being fully advised in the premises, and the court being satisfied from defendant's petition for a change of venue that a fair and impartial trial of this cause cannot be had in Chautauqua county because of the general prejudice of the inhabitants of said Chautauqua county against the above-named defendant—

It is therefore ordered that the place of trial be, and the same hereby is, changed to the county of Elk.

It is therefore directed that the clerk of this court transmit to the clerk of the district court of said Elk county a full transcript of the record and proceedings in this cause, including the order of removal, the petition therefor, and there cognizance of the defendant, and all of the papers in this cause duly certified under the seal of this court.

Whereupon the defendant then waives arraignment and enters a plea of not guilty as charged in the information; and it is therefore ordered by the court that the defendant be required to enter into a bond in the sum of five hundred dollars, to be approved by the clerk of this court, conditioned that said defendant appear on the first day of the next term of the district court of Elk county, there to remain from day to day and to abide the judgment of the court.

STATE OF KANSAS, }
Chautauqua County, } *ss:*

I, H. P. Moser, clerk of the district court in and for said county, do hereby certify the within and foregoing to be a full, true, and correct copy of certain proceedings had in said court in the case therein entitled as the same appears of record in my office.

[SEAL.] H. P. MOSER,
Clerk District Court, Chautauqua County.

7 In the District Court of Elk County, State of Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
F. KEIFER, Defendant.

Bill of Exceptions.

And now, on this 11th day of October, A. D. 1890, this case comes regularly on for trial, the plaintiff appearing by R. H. Nichols, J. D. McBrian, and J. V. Beekman, and the defendant appearing in person and by L. Scott and J. A. McHenry, his attorneys; come also twelve good and lawful men from the body of the county, who are duly empanelled and sworn to try this case; whereupon the following proceedings are had:

8 *Statement of Case on Behalf of Plaintiff by J. D. McBrian, Esq.*

If the court please, gentlemen of the jury—

There are two citizens who live in Chautauqua county, one by the name of Sandy Lowe and one by the name of F. Keifer, who some time in the spring of 1889 became involved in a lawsuit. Keifer had sued Lowe for a store bill. Mr. Keifer is engaged in merchandising in the city of Peru, and Mr. Lowe was at that time a farmer living in the community near by. The lawsuit involved some $15 or $20.00 difference between these men on some kind of a settlement. The case was tried before a justice of the peace and was afterwards appealed to the district court. Some sort of a compromise was effected which resulted in favor of Sandy Lowe. That is the beginning of the trouble between these two citizens. Subsequently, in the fall of 1889, Mr. Lowe became a candidate for the office of sheriff of Chautauqua county; announced himself as a candidate for the nomination to that office, subject to the decision of the Republican county *county* convention of that county. Mr. Keifer, as soon as that fact was known, then began to make statements derogatory to the character of Mr. Lowe. I want to suggest here in the statement of this case that both of these men are Republicans. When the time for the convention was drawing near Mr. Keifer wrote a letter to a citizen of Chautauqua county living in Cedarville, who was interest- in the politics of the county, Wm. Riggs, and in that letter he stated to Mr. Riggs that Sandy Lowe, in the community there where he had lived, that it was the general talk in the community that he had whipped his wife on her death-bed; that the marks of the whipping were on his wife when she was laid out for burial, and in the letter he referred to the names of some ladies, one lady in particular, who *who* helped lay her out, as proof of his statement; also in that letter stating that Sandy Lowe had been in jail in Missouri. These statements were made derogatory to Mr. Lowe's character, as claimed on the part of the State in this case, from malice and bad motives, and that they are not true, and that they were made because of malicious motives. It will be in

evidence before you that Mr. Keifer stated to different citizens of the county that in that lawsuit he had been beaten out of $15.00, and that if Lowe would pay the $15.00 which he believed to be due him he wouldn't make these statements any more; that because of this difference between them concerning this lawsuit that he would continue to make these statements unless the $15.00 difference between them was made satisfactory on the part of Lowe toward Keifer, and out of these statements, falsely made and from malicious motives, we believe on the part of the State, has grown this case that you are now called upon to pass on this case of criminal libel, and it has been brought here to this county because these things were very generally discussed in Chautauqua county during the campaign. We have come here because we have thought that in this county, not being interested in the local campaign and the controversy of that campaign, that as citizens and as men, without regard to your party affiliations, that you could listen to a statement of the facts in this case, and that you will hear all there is connected with it, and then that you will find a verdict in accordance with the evidence in the case.

In that letter it was also charged by Mr. Keifer that Lowe had not only been in jail in Missouri (a proposition that is absolutely false), but that he had run away from Missouri; that he had absconded from that State, and as we believe on the part of the State that these statements when made were not true, and that they were made because of this personal difference between these citizens growing out of that $15.00 lawsuit, and that they were made from malicious purposes and to defame the character and to destroy the good name of Mr. Lowe, who had lived in our county a number of years as a reputable citizen, this case is here, and we ask you to listen to the evidence patiently, weigh it fairly and impartially, and render such a verdict as your judgment will direct.

Whereupon the plaintiff introduced its evidence as follows:

In the District Court of Elk County, State of Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
F. KEIFER, Defendant.

GENTLEMEN OF THE JURY: 1. The sections of the constitution and laws of the State defining libel and the procedure of courts and juries concerning libel make a criminal case for libel an exception to ordinary criminal cases, and we cannot better direct your attention to distinction between this and ordinary criminal cases than by giving you said sections.

2. Section 11 of the bill of rights reads as follows:

"SECTION 11. The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects being responsible for the abuse of such right; and in all

civil or criminal actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted."

3. The various sections of the crimes act of this State relating to libel are in the words and figures following, to wit:

"SECTION 304. A libel is the malicious defamation of a person, made public by any printing, writing, sign, picture, representation or effigy, tending to provoke him to wrath, or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse, of any malicious defamation, made public as aforesaid designed to blacken and villify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives and friends."

4. "SECTION 305. Every person who makes or composes, dictates or procures the same to be done, or who willingly publishes or circulates such libels, or in any way, knowingly and wilfully, aids or assists in making, publishing or circulating the same, shall be punished by imprisonment in the county jail not more than one year, or by a fine not exceeding one thousand dollars."

5. "SECTION 306. In all prosecutions or indictments for libels, the truth thereof may be given in evidence to the jury, and if it appears to them that the matter as charged as libelous was true, and was published with good motives and for justifiable ends, the defendant shall be acquitted."

6. "SECTION 307. No printing, writing or other thing is a libel, unless there has been a publication thereof."

7. "SECTION 308. The delivery, selling, reading or otherwise communicating a libel or causing the same to be delivered, sold, read or otherwise communicated to one or more persons, or to the party libelled, is a publication thereof."

8. "SECTION 309. In all indictments or prosecutions for libel, the jury, after having received the directions of the court, shall have the right to determine at their discretion, the law and the fact."

11 9. Section 326 of the chapter on criminal procedure defines the duty of the court or jury in certain cases, and I therefore direct your attention to that section, which is in words and figures following, to wit:

"SECTION 326. Whenever it shall appear to the court or jury trying the case that the prosecution has been instituted without probable cause, and from malicious motives, the name of the prosecutor shall be ascertained, and stated in the finding; and such prosecutor shall be adjudged to pay the costs and may be committed to the county jail until the same are paid or secured to be paid."

10. A careful comparison of section 11 aforesaid with section 306 aforesaid will disclose to you that the legislature, when declaring in said section 306 what should constitute a defense to libel, have enlarged the defense mentioned and set forth in said section 11 by adding thereto the words "with good motives," and our supreme court have said that in so far as said section 306 requires a defendant in a libel suit to show that the publication was made with "good

motives" the same is unconstitutional and void; in other words, it is only necessary for a defendant charged with libel to show a complete defense to show that the libelous matter was true and was published for justifiable ends.

11. You will observe that section 326 aforesaid provides that the jury may in any case find that the prosecution has been instituted without probable cause and from malicious motives, and when the jury do so find it is their duty to state the name of the prosecuting witness in their finding, and in such case the prosecuting witness may be by the court adjudged to pay the costs in the case, and he may be by the court committed to the jail until the same are paid or secured to be paid, and in this case, if you are of the opinion that the provision of said section ought to be enforced you are at liberty to and ought to enforce the same.

12. The sections of the constitution and laws above quoted define libel and what shall constitute a legal defense thereto in such a plain and simple manner that I do not deem it necessary to give you any additional or further instruction or comment thereon. In addition, however, to what is therein set forth I deem it proper in this case to say to you that in certain cases and under certain circumstances a citizen may be justified in speaking and publishing matters and things of and concerning another citizen which may be upon their face libelous, yet may be spoken of and published of such citizen under such circumstances as that the law would make such speaking and publication privileged matter and would not hold the person so speaking and publishing the same liable either in civil or criminal case for libel. Under our form of government, where most of the officers are to be chosen by the people at elections to be held for that purpose, it becomes necessary in the very nature of things, in order to select proper officers to administer the Government, that the electors should have the right to carefully inquire into the character, qualifications, and standing of every candidate for office, and it is equally necessary that every citizen should have the right to diligently inquire into the character, standing, and qualification of every candidate for office, and every citizen has also the right to communicate to any other citizen what he may believe, in good faith, to be the fitness, character, and standing of any candidate for office, and in so doing his communication would be privileged and he could not in any such case be held *for* liable either in a civil or criminal case for libel, unless it appears to the satisfaction of a court or jury that he had wickedly, maliciously, and knowingly
12 published libelous things of and concerning such candidate, with the wicked and malicious intention of injuring him in his good name and standing in the community.

13. In this case the court is of the opinion that as a matter of law the plaintiff will not be entitled to a verdict at your hands until it has satisfied you from the evidence beyond a reasonable doubt that the defendant wrote and published the letter introduced in evidence in this case, and that he did so with the wicked and malicious intent on his part to libel and injure the prosecuting witness, Sandy Lowe. In other words, in addition to showing the facts necessary

to be shown in an ordinary case of criminal libel, the plaintiff must show that the libel in this case was written and published with the wicked and malicious intent on the part of the defendant to injure the said prosecuting witness.

14. You are the exclusive judges of the weight of the evidence and of the credibility of the witnesses and of the facts proved. In weighing the evidence of the witnesses in this case you should take into consideration the manner and demeanor of the witnesses while in your presence, their apparent means of knowledge of the facts to which they have testified, their apparent relation to the result of this suit, together with their relation to any of the parties to this suit.

15. We have permitted certain depositions in this case to be read in your presence under what the defendant claims to have been an agreement made between his counsel and the counsel for the State in this case, and you have heard these counsel testify concerning that agreement. If you are of the opinion from the evidence in the case that there was an agreement made on the part of counsel for the State that the defendant might use these depositions on this trial, then you ought to receive and accept and carefully consider said depositions; but, upon the contrary, if you are not of the opinion that there was such an agreement made, then you ought not to regard and consider the said depositions at all in the trial of this case, but ought to reject them altogether. I make you the exclusive judges of whether you shall or shall not consider these depositions, because under the law of this case you are to be the exclusive judges, in your discretion, of both the law and the fact.

16. The defendant is presumed to be innocent of the offense charged against him until the contrary is made to appear from the evidence beyond a reasonable doubt, and so long as any individual juror has in his mind any reasonable doubt as to the guilt of this defendant such juror ought to refuse to convict him.

17. You will observe from section 309, above quoted, that you are, in your discretion, the judges of both the law and the fact of this case, and, this being so, we can only direct you as best we may to the law of the case.

The counsel for the State and the counsel for the defendant have the right to present to you in argument their views as to the law of the case under our guidance and direction as well as to present to you their views in argument of the facts in the case, and after you have carefully considered the law as we have given it to you and also carefully considered the law as presented to you by the counsel for both parties, as well as having considered all the facts of the case, you are then, in your discretion, to decide what is both the law and the fact in this case and should and ought to return a verdict in accordance therewith.

M. G. TROUP, *Judge.*

13 To the giving of which instructions, each and every part thereof, and particularly to the giving of the 15th paragraph thereof, the plaintiff, by J. V. Beekman, excepts.

EXHIBIT "1."

SEPTEMBER 30TH, 1889.

We, Mary Batson and Tichie Batson, daughters of Captain Sandy Lowe, being duly sworn *by me*, F. M. Floyd, a justice of the peace, of Belleville township, Chautauqua county, and State of Kansas, say that we have seen a letter addressed to W. J. Riggs, of Cedarvale, Kansas, and signed by F. Keifer, of Peru, Kansas. In that letter F. Keifer says that Captain Lowe run away from Missouri; was in jail in Missouri; has trouble with everybody he has dealings with, and that the general talk is that he whipped mother on her death-bed. It is not the talk, nor neither did he do so. We were both at home all the time during mother's last sickness and until after her death, and if anything of that kind had taken place we would have known it, so we say positively that that charge is false as well as every other above referred to contained in the said Keifer letter, and no truth in them whatever; and another charge in the Keifer letter, that Mrs. Foltz helped dress mother for burial, is not true either.

MARY A. BATSON.
TISHIE BATSON.

Subscribed and sworn to before me this 30th day of September, 1889.

F. M. FLOYD,
Justice of the Peace in and for Belleville Township,
Chautauqua County, Kansas.

EXHIBIT "2."

CHAUTAUQUA COUNTY, KANSAS, *September 26th*, 1889.

We, James Thomas and Luella Thomas, make the following statements under oath:

I, James Thomas, lived with Mr. Sandy Lowe about seven (7) years ago in Henry county, Missouri; went there to live in December, and in March I came with him to Kansas and worked for him until the July following, and during that time or any other time, before or after, I did not see or know of Mr. Lowe whipping Mrs. Lowe. I have heard a report from some of the Lowe family that Mr. Lowe was correcting his grandson, Willie, who was living with him, and that Mrs. Lowe interfered and by some means accidentlly got a lick with the switch that Mr. Lowe was trying to whip Willie with; is all the whipping that I ever heard that took place between Mr. Lowe and his wife.

I, Ella Thomas, one of Sandy Lowe's daughters, do say under oath that I never saw or knew of father striking mother in my life, nor neither did I tell any person that he ever did strike or whip her. There was a man who called himself Stutsman who came to our house last week when my husband was away from home and

inquired of me about my father's war record, and also about his private family matters. I stated to that man that some of the children or girls said to me that father hit mother on the arm or shoulder. Now, the children or the girls, whoever it was that told me about the hitting, said it was the time when father went to whip Willie and mother was trying to keep father from whipping Willie, and in the squabble accidentally got a lick herself with the switch that he was using to whip Willie with; that is the only time that I ever heard that father hit mother with a switch or with anything else.

I intended last evening to have come to Sedan today and
14 be qualified to the above statements, but cannot now come today, but will say to whoever it may concern that all of the above statements of mine are true and correct, and that I will swear to them at any time required.

LUELLA THOMAS.

This 23rd day of September, 1889.

Witness:
SARAH ROBERTS.

I, James Thomas, say that the within statements made by me are true.

J. A. THOMAS.

Subscribed and sworn to before me this 28th day of September, 1889.

[SEAL.] W. F. WADE,
County Clerk.

EXHIBIT "A."

Office of F. Keifer, dealer in general merchandise and shipper of produce.

PERU, KANSAS, *August* 23, 1889.

Mr. W. J. Riggs, Cedarvale, Ks.

DEAR SIR: Yours at hand; in reply will say that Capt. Lowe has no friends in this part of the county; don't know of a man that will vote for him. He may run well where he is not known. He is rough, overbearing, and has trouble with everybody he has dealings with and also with his own family. The general talk here is that he whipped his wife on her death-bed, and that marks were on her body when she was buried.

He had to run away from Missouri; been in jail in Missouri. I think we have plenty of good men in this county for sheriff without taking up such a man as Capt. Lowe He has no education. Now, Mr. Riggs, I will refer you to his neighbors Herbert Miller or Joe Foltz—Mrs. Foltz helped dress Mrs. Lowe when she was buried—or his own children.

Yours truly, F. KEIFER.

EXHIBIT "B."

CEDARVALE, Ks.

Please write me in regard to Capt. Lowe's standing in your township. Answer me at once and oblige,

Yours truly, W. J. RIGGS.

Postmarked Cedarvale, Aug. 22.
Addressed Mr. F. Keifer, Peru, Kansas.

EXHIBIT "C."

CEDARVALE, KAS.

Please write me in regard to Capt. Lowe's standing in your community. Has he any strength down there? Who are you for for sheriff?

Yours truly, W. J. RIGGS.

Addressed Jo. Fulse, Peru, Kansas.

15 And the foregoing being all the testimony offered by either party on the trial of this action, and S. Lowe, the prosecuting witness in this action, having filed and presented to the court on this 18th day of October, A. D. 1890, his motion for the setting aside of the part of the verdict against him as such prosecuting witness rendered by the jury in this action and for a new trial as to him, the said S. Lowe, prosecuting witness, and the court having overruled said motion, and the — S. Lowe having duly excepted to the said rulings of said court, and the said S. Lowe having also filed and presented to the court on this the said 18th day of October, A. D. 1890, his further motion in arrest of judgment against him on said verdict, and the court having also overruled said last-mentioned motion, and the said S. Lowe, having also duly excepted to said ruling of the court on said last-mentioned motion and to the judgment on the verdict against said S. Lowe thereupon rendered, *and* prayed the court here to sign and seal this his bill of exceptions and order the same to be filed and made a part of the record in this cause, all of which is done and ordered as prayed for by the said S. Lowe, prosecuting witness.

M. G. TROUP, *Judge.*

Attest: J. C STEELE,
Clerk of District Court, Elk County, Kansas. [L. S.]

Bill of exceptions endorsed: Filed October 18th, 1890. J. C. Steele, clerk of the dist. court of Elk county, Kansas.

16 SATURDAY, *Oct.* 11*th*, 1890.

Oct. Term, 1890. Journal " H," page 59.

STATE OF KANSAS, Plaintiff,
vs.
F. KEIFER, Defendant.

Now, on this day, this cause comes on for trial in its regular order and comes the plaintiff, by R. H. Nichols, county attorney of Elk county, and J. D. McBrian, Esq., county attorney of Chautauqua county, Kansas, and J. V. Beekman, Esq., and comes the defendant in person and by L. Scott and J. A. McHenry, his attorneys, and thereupon comes a jury of the body of the county, to wit:

C. L. Kasson, A. J. Curtis, J. F. Fiscus, E. W. Nash, W. F. Metsker, Gus. Anderson, John Fleek, W. J. Lindlow, J. F. Darby, A. Tulois, William Harvey, Ed. Trimble, who *being* duly empannelled and sworn to well and truly try the cause; and thereupon the plaintiff, by its attorney, states its case and proceeds to the introduction of the evidence, and pending the introduction of the same, the hour of adjournment having arrived, the court admonished the jury and continued the further hearing of this cause until Monday morning, Oct. 13, 1890, at 9 o'clock a. m.

MONDAY, *Oct.* 13*th*, 1890.

Oct. Term, 1890. Journal " H," page 61.

STATE OF KANSAS, Plaintiff,
vs.
F. KEIFER, Defendant.

Now, on this day, this cause comes on further for trial, and comes the said parties and their attorneys as on the adjournment, and come the jury heretofore empanelled, and the plaintiff proceeds with the introduction of its evidence and concludes the same; and thereupon the defendant, by L. Scott, states his defense to the jury and proceeds to the introduction of his evidence, and rested his case; and the plaintiff then proceeded with the introduction of its evidence in rebuttal, and pending the same, the hour of adjournment having arrived, the further trial of this cause is so continued to tomorrow morning, and after being admonished by the court the jury was permitted to separate until 8.30 a. m. tomorrow.

TUESDAY, *Oct.* 14*th*, 1890.

October Term, 1890. Journal " H," page 66.

THE STATE OF KANSAS, Plaintiff,
vs.
F. KEIFER, Defendant.

Now, on this day, the further trial of this cause is resumed, and comes the plaintiff, by its attorneys, R. H. Nichols, J. D. McBrian, and J. V. Beekman, Esq., and comes the defendant in person and

by L. Scott and J. A. McHenry, his attorneys, and comes the jury heretofore empanelled in this action, and therefore the plaintiff proceeds to the introduction of its evidence and rests, and the court instructs the jury in writing; and thereupon the parties proceed to the argument of the case and concluded the same, and the jury retire in charge of a sworn officer to consider their verdict, and thereafter, on the same day, the jury returned into court in charge of
17 the said officer and rendered their verdict in open court in words and figures as follows, to wit:

STATE OF KANSAS, } ss:
Elk County, }

In the District Court of the 13th Judicial District.

THE STATE OF KANSAS, Plaintiff, }
vs.
F. KEIFER, Defendant. }

Verdict.

We, the jury impanelled and sworn in the above-entitled case, do upon our oaths find the defendant not guilty, and we do further find that this prosecution was instituted without probable cause and from malicious motives, and that the name of the prosecuting witness is S. Lowe.

C. L. KASSON, *Foreman.*

And thereupon, at the request of the attorney for plaintiff, the jury was polled and the court, being satisfied therewith, ordered that the same stand as and for the verdict of the jury.

It was thereupon ordered by the court that the defendant, F. F. Keifer, be discharged and go hence without day.

SATURDAY, *October 18th,* 1890.

Oct. Term, 1890.

THE STATE OF KANSAS, Plaintiff, }
vs.
F. KEIFER, Defendant. }

Now, on the 18th day of October, A. D. 1890, this cause comes on *for* further to be heard on the motion of S. Lowe to set aside so much of the verdict of the jury in the above-entitled action as found "that the prosecution was instituted without probable cause and from malicious motives, and that the name of the prosecutor was S. Lowe," and the said S. Lowe appearing by J. V. Beekman and M. B. Light, Esq., his attorneys, and the court, after hearing the argument of counsel and being fully advised in the premises, doth overrule and deny said motion of the said S. Lowe; to which ruling of the court the said Lowe excepted and excepts.

And thereupon the said Lowe, by his said attorneys, presents to

the court his further motion in arrest of judgment upon said verdict against him as such prosecuting witness, and, the said motion having been duly heard by the court, the same is denied and overruled by the court; to which said ruling of the court on said last-mentioned motion the said S. Lowe, by his said attorneys, also duly excepted and still excepts.

And thereupon said cause comes further on to be heard on the verdict of the jury heretofore rendered in this action, the plaintiff present by R. H. Nichols, Esq., county attorney of Elk county, and the defendant by L. Scott, his attorney, and the said S. Lowe in person and by J. V. Beekman and M. B. Light, Esq., his attorneys, and the court, after being fully advised in the premises, doth consider, order, and adjudge that the prosecuting witness, S. Lowe, in the above-entitled action pay all costs of said action, taxed at $1,053.40, and that he be committed to the jail of Elk county, Kansas, until said costs are paid or until said S. Lowe shall execute a good and sufficient bond, with two or more sureties, in the sum of twenty-five hundred dollars, to be approved by the sheriff of Elk county, Kansas, conditioned that he, the said S. Lowe, will pay all costs in the above-entitled action within six months from the date hereof, and thereof let execution issue; to the rendering of which said judgment the said S. Lowe, by his said attorneys, excepted and still except-.

18 THE STATE OF KANSAS, Plaintiff,
vs.
F. KEIFER, Defendant.

And now, on this 18th day of October, A. D. 1890, comes the said S. Lowe, prosecuting witness in the above-entitled action, by J. V. Beekman and M. B. Light, his attorneys, and presents to the court now here his bill of exceptions to the overruling of his motion for the setting aside of the part of the verdict rendered by the jury in this cause against him as such prosecuting witness and for a new trial as to him, the said S. Lowe, prosecuting witness, and to the overruling of his motion in arrest of judgment against the said S. Lowe, and the said bill of exceptions is signed, sealed, and allowed by the court and ordered to be placed on file and made a part of the record in this cause.

STATE OF KANSAS,
Elk County.

In the District Court of said County.

THE STATE OF KANSAS, Plaintiff,
vs.
F. KEIFER, Defendant.

And now comes S. Lowe, the prosecuting witness in the above-entitled cause, in person and by J. V. Beekman and M. B. Light, his attorneys, and enters his motion that so much of the verdict of

the jury as finds and states that "this prosecution was instituted without probable cause and from malicious motives" *to* be set aside, and that said S. Lowe have a new trial in that respect—that is to say, that the said prosecuting witness, S. Lowe, have a trial before a jury in this court or upon the question whether this prosecution was instituted without probable cause and from malicious motives, as stated in said verdict, for the following reasons, to wit:

1st. That the said S. Lowe, upon the trial already had, has not been heard and could not be heard, either in person or by counsel, in his own defense touching the matter and things above mentioned as stated and contained in said verdict, being neither plaintiff or defendant in this prosecution.

2nd. That in said trial the court erred in matters of law to the prejudice of the said S. Lowe in permitting and directing certain depositions to be read to said jury, and at the same time saying to and instructing the jury as follows, to wit:

"GENTLEMEN OF THE JURY: Owing to the fact that in the trial of this case you are, in your discretion, to be the exclusive judges of both the law and the facts in this case, I know of no way now to settle the question that is in controversy here than to do this: You must, of course, finally say whether Mr. McBrian did or did not consent to the reading of these depositions; if he did consent to their reading, then the defendant has the right to rely upon that consent and then these depositions will become competent evidence in this case and it will be proper for you to consider them as part of the evidence in this case.

I therefore now propose to permit the defendant to read all of these depositions in your hearing, with the direction from me that if you finally find the fact in favor of the defendant that such agreement was made, then it will be proper for you to consider and you ought to consider these depositions as a part of the evidence in the case; but if, on the contrary, you do not believe that Mr. McBrian ever made any such agreement or consented, then it will not
19 be proper for you to consider these depositions as a part of the evidence in the case, and in that event you ought to refuse to consider them; this is a question of fact in the case and one that I am powerless to decide for you; you must decide that for yourselves."

3rd. That this court further erred in matters of law to the prejudice of the said S. Lowe by instructing the jury, in paragraph 11 of the general instructions to the jury, in the words following, to wit:

"You will observe that section 326 aforesaid provides that the jury may in any case find that the prosecution has been instituted without probable cause and from malicious motives, and when the jury do so find it is their duty to state the name of the prosecuting witness in their finding, and in such case the prosecuting witness may be by the court adjudged to pay the costs in the case, and he may be by the court committed to jail until the same are paid or secured to be paid; and in this case, if you are of the opinion that

the provisions of said section ought to be enforced, you are at liberty to and ought to enforce the same."

4. That this court further erred in matters of law to the prejudice of the rights of the said S. Lowe by further instructing the jury, in paragraph 15 of said instructions, in the words following, to wit:

"We have permitted certain depositions in this case to be read in your presence under what the defendant claims to have been an agreement made between his counsel and the counsel for the State in this case, and you have heard these counsel testify concerning that agreement. If you are of the opinion from the evidence in the case that there was an agreement made on the part of counsel for the State that the defendant might use these depositions on this trial, then you ought to receive and accept and carefully consider said depositions; but, upon the contrary, if you are not of the opinion that there was such an agreement made, then you ought not to regard and consider the said depositions at all in the trial of this case, but ought to reject them altogether. I make you the exclusive judges of whether you shall or shall not consider these depositions, because under the law of this case you are to be the exclusive judges, in your discretion, of both the law and the fact."

5th. That said verdict is contrary to the law and the evidence in the case.

6. That the court further erred in matters of law to the prejudice of the rights of the said S. Lowe by instructing the jury, in paragraph 8 of said general instructions, in the words following, to wit:

"SECTION 309. In all indictments or prosecutions for libel the jury, after having received the direction of the court, shall have the right to determine, at their discretion, the law and the fact;" and that that section of the statutes of the State of Kansas is not the law of the land, but that the same is contrary to the genius of the institutions of the State of Kansas and unconstitutional, null, and void.

J. V. BEEKMAN,
M. B. LIGHT,
Attorneys for S. Lowe.

Filed October 17, 1890.

J. C. STEELE, *Clerk.*
MYRA WHITE, *Deputy.*

20 STATE OF KANSAS, } *ss:*
Elk County, }

In the District Court of said County.

THE STATE OF KANSAS, Plaintiff, }
vs.
F. KEIFER, Defendant. }

And now comes S. Lowe, the prosecuting witness in this cause, in his own proper person and by J. V. Beekman and M. B. Light, his attorneys, and enters his motion that judgment against him

upon the verdict of the jury in this action be arrested for the reasons following, to wit:

1st. For the reasons set forth in his motion that the verdict rendered against him as prosecuting witness in this action, and for a new trial or trial by a jury heretofore heard in this proceeding and overruled by this court.

2nd. That the said S. Lowe, prosecuting witness as aforesaid, has not been heard nor has he had any opportunity to be heard, either in person or by attorney, in his defense concerning the matters found and set forth against him in the said verdict of the jury in this action, and that he has the right by law of the land to be so heard in his own defense and to a separate trial concerning his liability as prosecuting witness in this action, which separate trial he hereby demands of this court.

J. B. BEEKMAN,
M. B. LIGHT,
Attorneys for S. Lowe.

Filed October 18th, 1890.

J. C. STEELE, *Clerk.*
MYRA WHITE, *Deputy.*

STATE OF KANSAS, } ss:
Elk County, }

In the District Court of said County.

THE STATE OF KANSAS, Plaintiff, }
vs.
F. KEIFER, Defendant. }

To J. C. Steele, clerk of the district court of said Elk county; R. H. Nichols, county attorney of said Elk county, and J. D. McBrian, county attorney of Chautauqua county, Kansas.

GENTLEMEN: You and each of you are hereby notified that S. Lowe, the prosecuting witness in the above-entitled action, appeals from the judgment rendered and entered against him as said prosecuting witness in and by the said district court of Elk county, Kansas, on the 18th day of October, A. D. 1890.

S. LOWE.
J. V. BEEKMAN,
M. B. LIGHT,
Attorneys for S. Lowe.

Endorsed: The State of Kansas *vs.* F. Keifer. Notice of appeal of S. Lowe, prosecuting witness. Filed Nov. 17, 1890. J. C. Steele, clerk. Myra White, deputy.

21 STATE OF KANSAS, }
Elk County, }

In the District Court of said County.

THE STATE OF KANSAS, Plaintiff, }
vs.
F. KEIFER, Defendant. }

To J. C. Steele, clerk of the district court of said Elk county; R. H. Nichols, county attorney of said Elk county, and J. D. McBrian, county attorney of Chautauqua county, Kansas.

GENTLEMEN: You and each of you are hereby notified that S. Lowe, the prosecuting witness in the above-entitled action, appeals from the judgment rendered and entered against him as said prosecuting witness in and by the said district court of Elk county, Kansas, on the 18th day of October, A. D. 1890.

S. LOWE.
J. V. BEEKMAN,
M. B. LIGHT,
Attorneys for S. Lowe.

STATE OF KANSAS, }
Elk County, } *ss:*

M. B. Light, of Chautauqua county, Kansas, being first duly sworn, upon oath deposes and says that on the 17th day of November, A. D. 1890, he served a notice on J. C. Steele, clerk of the district court of said Elk county, and a like notice on R. H. Nichols, county attorney of said Elk county, of which said notices so served the above notice is a full and complete duplicate copy; that he served said notice on the said J. C. Steele by delivering the said notice to Miss Myra White, the deputy district clerk of the said J. C. Steele, at and within the said district clerk's office, in the court-house, in Howard, Elk county, Kansas, the said J. C. Steele, district clerk, being absent from said Elk county; that he served the notice on the said R. H. Nichols, county attorney as aforesaid, by delivering the same to him in person at said Howard, Elk county, Kansas, and that he served a like notice, of which the foregoing is a full and complete duplicate copy, on J. D. McBrian, county attorney of Chautauqua county, Kansas, at his office, in Sedan, Chautauqua county, Kansas, on the 15th day of November, A. D. 1890, by delivering said notice to him in person; and further saith not.

M. B. LIGHT.

Subscribed and sworn to before me this 17th day of November, A. D. 1890.

J. C. STEELE, *Clerk.*
MYRA WHITE, *Deputy.*

Endorsed: The State of Kansas *vs.* F. Keifer. Affidavit of service of notice of appeal by S. Lowe, prosecuting witness. Filed November 17th, 1890. J. C. Steele, clerk. Myra White, deputy.

22 STATE OF KANSAS, } ss:
Elk County, }

In the District Court of said County, *ss:*

THE STATE OF KANSAS, Plaintiff, }
vs.
F. KEIFER, Defendant. }

To F. Keifer, the above-named defendant, and Luther Scott, his attorney:

You are hereby notified that S. Lowe, the prosecuting witness in the above-entitled action, appeals from the judgment rendered and entered against him as said prosecuting witness in and by the said district court of Elk county, Kansas, on the 18th day of October, A. D. 1890.

S. LOWE.
J. V. BEEKMAN,
M. B. LIGHT,
Attorneys for S. Lowe.

STATE OF KANSAS, } ss:
Elk County, }

A. F. Ayres, of said county and State, being first duly sworn, upon oath deposes and says that on the 17th day of November, A. D. 1890, he served a written notice, of which the above and foregoing is a full, true, and complete copy, on the above-named Luther Scott, attorney for defendant in the above-entitled action, by delivering said notice to him in person; and further saith not.

A. F. AYRES.

Subscribed and sworn to before me this 9th day of December, A. D. 1890.

H. S. DOUTHITT,
Notary Public, Elk Co., Kans.

My com. expires Feb. 22, 1893.

Filed Dec. 12, 1890.

C. J. BROWN,
Clerk Sup. Court.

Endorsed: Copy. Filed Dec. 10, 1890. J. C. Steele, clerk district court.

23 STATE OF KANSAS, } ss:
Elk County, }

In the District Court of said County.

THE STATE OF KANSAS, Plaintiff, }
vs.
F. KEIFER, Defendant. }

To F. Keifer, the above-named defendant, and Luther Scott, his attorney:

You are hereby notified that S. Lowe, the prosecuting witness in the above-entitled action, appeals from the judgment rendered and entered against him as said prosecuting witness in and by the said district court of Elk county, Kansas, on the 18th day of October, A. D. 1890.

S. LOWE.
J. V. BEEKMAN,
M. B. LIGHT,
Attorneys for S. Lowe.

Filed Dec. 12, 1890.

C. J. BROWN,
Clerk Sup. Court.

STATE OF KANSAS, } ss:
Elk County, }

M. B. Light, of Chautauqua county, Kansas, being first duly sworn, upon oath deposes and says that on the 18th day of November, A. D. 1890, he served a written notice, of which the foregoing is a true, full, and complete copy, on the above-named defendant, F. Keifer, by delivering said notice to him in person.

M. B. LIGHT.

Subscribed and sworn to before me this 9th day of December, A. D. 1890.

H. S. DOUTHITT,
Notary Public, Elk Co., Kans.

My commission expires Feb. 22, 1893.

Endorsed: Filed Dec. 10, 1890. J. C. Steele, clerk dist. court.

24 STATE OF KANSAS, } ss:
Elk County, }

I, J. C. Steele, clerk of the district court of said Elk county, Kansas, do hereby certify that the foregoing pages, from "*a*" to "*c*," inclusive, and pages 1 to 301, inclusive, hereto attached, comprise a complete and true copy of all the papers on file in my office and of all the entries in the journal of the proceedings of the district court of Elk county, Kansas, in the case of The State of Kansas, plaintiff, *vs.* F. Keifer, defendant, including all records and papers in said proceedings as to and against S. Lowe, the prosecuting witness, the

said transcript including, from page *a* to 1, inclusive, all records and proceedings in said action in the district court of Chautauqua county, Kansas, where said action was originally commenced, from pages 102 to 286 being a copy of the bill of exceptions of the said S. Lowe, including the certificate of the judge thereto; pages from 287 to 293 includes all journal entries of the records and proceedings in said action as well concerning the said S. Lowe, prosecuting witness, as concerning said defendant, F. Keifer, pages 277 to page 281, inclusive, being a full, true, and complete copy of the general instructions given by the court to the jury and duly filed and remaining in my office, pages 294 to 297 containing copies of the several motions filed by the said S. Lowe and overruled by the court, and that pages 299 to page 301, inclusive, include the original notices of appeal served on me by said Lowe and the proof of service of notice of the appeal on each myself as clerk of the district court of Elk county, Kansas; on R. H. Nichols, county attorney of Elk county, Kansas; on J. D. McBrian, county attorney of Chautauqua county, Kansas; on Luther Scott, attorney for F. Keifer, defendant in said action, and on F. Keifer himself; all of which appears to me from the original papers on file and the record thereof remaining in my office.

In testimony whereof I have hereunto set my hand and official seal, at Howard, in said county, this the 10th day of December, A. D. 1890.

J. C. STEELE,
Clerk District Court, Elk County, Kansas.

25 And afterwards, on the 6th day of March, 1891, the same being one of the regular judicial days of the January term, 1891, of the supreme court of the State of Kansas, before said court, in session at the supreme court room, in the city of Topeka—present, Hon. Albert H. Horton, chief justice; Hon. Daniel M. Valentine and Hon. Wm. A. Johnston, associate justices; and C. J. Brown, Esq., clerk of said court—the following proceeding, among others, was had and entered of record as follows, to wit:

In the Matter of the Appeal of S. LOWE, Prosecuting Witness, from the Judgment against Him for Costs. No. 7236.

This cause comes on to be heard on the notices of appeal and the transcript of the record of the district court of Elk county, and thereupon, after oral argument by M. B. Light for the appellant and by L. Scott for the appellee, the said cause was submitted on the brief- of counsel for both parties herein and taken under advisement by the court.

26 And afterwards, on the 9th day of May, 1891, the same being one of the regular judicial days of the January term, 1891, of the supreme court of the State of Kansas, before said court, in session at the supreme court room, in the city of Topeka—present, Hon. Albert H. Horton, chief justice; Hon. Daniel M. Valentine,

Hon. William A. Johnston, associate justices, and C. J. Brown, Esq., clerk of said court—the following proceeding, among others, was had and entered of record as follows, to wit:

In the Matter of the Appeal of S. LOWE, Prosecuting Witness, from the Judgment against Him for Costs in The State of Kansas *vs.* F. Keefer. No. 7236.

This cause comes on for decision, and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that S. Lowe pay the costs of this case in this court, taxed at $—, and hereof let execution issue.

27 And also on the 9th day of May, A. D. 1891, there was filed in the office of the clerk of the supreme court of the State of Kansas the opinion and syllabus of the court in said cause, which is in words and figures as follows, to wit:

28 7236.

In the Matter of the Appeal of S. LOWE, Prosecuting Witness, from the Judgment against Him for Costs in The State of Kansas *vs.* F. Keifer.

Appeal from Elk county. Affirmed.

Syllabus by the court, SIMPSON, *C.*:

1. Neither section 275 nor 326 of the code of criminal procedure (Compiled Laws of 1885) is unconstitutional and void.
2. A question as to the proper taxation of costs will not be considered in this court without a motion to retax has been acted upon by the court below.

All the justices concurring.

A true copy.
Attest:

——— ———,
Clerk Supreme Court.

29 7236.

In the Matter of the Appeal of S. LOWE, Prosecuting Witness, from the Judgment against Him for Costs in The State of Kansas *vs.* Keifer.

Appeal from Elk county. Affirmed.

Opinion by SIMPSON, *C.*:

An information was filed against one F. Keifer in the district court of Chautauqua county, charging that the defendant on the 23d day of August, 1889, unlawfully, willfully, and maliciously made, composed, and circulated against the appellant, S. Lowe, a certain false, malicious, defamatory, and scandalous letter-writing and communication, set forth in full in said information. A change of

venue was taken to Elk county, and the case was tried in the district court of that county before a jury and a verdict returned October 14th, 1889, finding the defendant not guilty; that the prosecution was instituted without probable cause and from malicious motives, and stated the name of the prosecuting witness to be S. Lowe. The defendant Keifer was discharged from custody without day.

On the 17th day of October, 1890, the appellant, as prosecuting witness, filed a motion for a new trial, so far as the verdict related to him as a prosecuting witness, which was overruled. On the 18th day of October he filed a motion in arrest of judgment, and this was overruled.

The distinct causes for a new trial and arrest of judgment were:

First. That upon the trial he had not been heard, either in person or by his attorney, in his own defense touching the matter in
30 controversy, being neither plaintiff or defendant in the action.

Second. That the trial court erred in matters of law, permitting certain depositions to be read, and in certain instructions respecting the same.

Third. Error in instruction respecting section 326, chapter 82, Criminal Procedure.

Fourth. That the verdict is contrary to the law and the evidence in the case.

Fifth. That the court erred in its instructions respecting section 275, chapter 31, General Statutes; that said section is unconstitutional and void. On motion for arrest of judgment he claimed he had a right to be heard and that he had a right to a separate trial, which he demands.

The court pronounced judgment on the verdict that S. Lowe pay all costs of said action, taxed at $1,053.40; that he be committed to the jail of Elk county until such costs are paid or until he executes a good and sufficient bond, with two or more sureties, in the sum of $2,500, to be approved by the sheriff of said county, conditioned that he pay all costs in said action within six months from the date of said judgment. At the time the judgment for costs was rendered and the various rulings of the trial court were made the appellant saved exceptions. A bill of exceptions was duly signed by the court and attested and an appeal taken to this court.

Some of the questions discussed by the counsel for the appellant, both in his oral argument and his elaborate brief, have been decided adverse to his views. He claims that both section 275 and 326 of the Code of Criminal Procedure are unconstitutional and void for a variety of reasons.

31 1. We are met by a very serious question on the threshold of the consideration of this record, and that is whether this court can review the rulings and proceedings of the court below. We are asked to set aside the judgment of the court below against this appellant for costs, for the reason that the lower court committed many grievous errors of law at the trial and because the statutes authorizing such a judgment for costs are unconstitutional

and void. In the case of The State *v.* Zimmerman, 31 Kas., 85, which was a prosecution for criminal libel, the jury acquitted the defendant; found that the prosecution was instituted without probable cause and from malicious motives. On motion of the defendant, the part of the verdict was set aside that found want of probable cause and malicious motives, and a judgment for costs was rendered against Leavenworth county. The State reserved the question of costs under section 283 of the criminal code and appealed to this court. This court say:

"In all prosecutions for libel the jury have the right to determine, at their discretion, the law and the fact, and therefore the instructions of the court are not to bind the consciences of the jury, but only to inform their judgments. Under sec. 326 of the criminal code the jury trying the case exercised the right permitted by the statute of stating in their finding the name of the prosecutor, and that the prosecution was instituted without probable cause and from malicious motives. The court had no power to set aside the verdict in such a case and it was equally powerless to set aside a part thereof. Therefore, in the absence of such power, the order of the court was erroneous and must be reversed."

Counsel for plaintiff in error criticise this decision and very earnestly inquires "why the trial court had no power to set aside a part of the verdict." The reason is an obvious one; it is because a statute of the State expressly gives the jury in such an action the right, power, and discretion to determine the law and the fact for themselves. Counsel attack this provision of the statute and say it is unconstitutional and void, but he forgets that within his
32 memory the practice in criminal cases in almost all, if not all, of the States was for the jury to pass upon the law and the facts. The force of another universal practice of courts everywhere ought to be adverted to, and that is when a jury return a verdict of not guilty in a criminal case the trial court has no power to set it aside or modify it in any respect. These findings against the prosecuting witness were a part of a verdict of a jury in a criminal case wherein express power by statutory enactment is given a jury to determine both the law and the facts. The trial court has no power to interfere with that verdict in any prejudicial respect and this court is as powerless as the court below.

2. The constitutionality of the other statute has been upheld by this court in the case of *In re* Ebenhack, 17 Kas., 618, decided many years ago.

3. It is not necessary for us to attempt a construction of sections 252 and 326 of the criminal code, as there was no motion to retax the costs filed in the court below, and the record discloses no ruling on that question. It is true that there is a statement made by the clerk attached to the record long after its filing in this court showing that the full amount of costs accruing in the case is $1,585.90, and of this it is said that $1,181 are the costs of prosecution and $404.90 of the defense, but we are governed by the record, and that recites a judgment for costs against the prosecuting witness of $1,053.40.

All that we can do in the present condition of the record on the

venue was taken to Elk county, and the case was tried in the district court of that county before a jury and a verdict returned October 14th, 1889, finding the defendant not guilty; that the prosecution was instituted without probable cause and from malicious motives, and stated the name of the prosecuting witness to be S. Lowe. The defendant Keifer was discharged from custody without day.

On the 17th day of October, 1890, the appellant, as prosecuting witness, filed a motion for a new trial, so far as the verdict related to him as a prosecuting witness, which was overruled. On the 18th day of October he filed a motion in arrest of judgment, and this was overruled.

The distinct causes for a new trial and arrest of judgment were:

First. That upon the trial he had not been heard, either in person or by his attorney, in his own defense touching the matter in
30 controversy, being neither plaintiff or defendant in the action.

Second. That the trial court erred in matters of law, permitting certain depositions to be read, and in certain instructions respecting the same.

Third. Error in instruction respecting section 326, chapter 82, Criminal Procedure.

Fourth. That the verdict is contrary to the law and the evidence in the case.

Fifth. That the court erred in its instructions respecting section 275, chapter 31, General Statutes; that said section is unconstitutional and void. On motion for arrest of judgment he claimed he had a right to be heard and that he had a right to a separate trial, which he demands.

The court pronounced judgment on the verdict that S. Lowe pay all costs of said action, taxed at $1,053.40; that he be committed to the jail of Elk county until such costs are paid or until he executes a good and sufficient bond, with two or more sureties, in the sum of $2,500, to be approved by the sheriff of said county, conditioned that he pay all costs in said action within six months from the date of said judgment. At the time the judgment for costs was rendered and the various rulings of the trial court were made the appellant saved exceptions. A bill of exceptions was duly signed by the court and attested and an appeal taken to this court.

Some of the questions discussed by the counsel for the appellant, both in his oral argument and his elaborate brief, have been decided adverse to his views. He claims that both section 275 and 326 of the Code of Criminal Procedure are unconstitutional and void for a variety of reasons.

31 1. We are met by a very serious question on the threshold of the consideration of this record, and that is whether this court can review the rulings and proceedings of the court below. We are asked to set aside the judgment of the court below against this appellant for costs, for the reason that the lower court committed many grievous errors of law at the trial and because the statutes authorizing such a judgment for costs are unconstitutional

and void. In the case of The State *v.* Zimmerman, 31 Kas., 85, which was a prosecution for criminal libel, the jury acquitted the defendant; found that the prosecution was instituted without probable cause and from malicious motives. On motion of the defendant, the part of the verdict was set aside that found want of probable cause and malicious motives, and a judgment for costs was rendered against Leavenworth county. The State reserved the question of costs under section 283 of the criminal code and appealed to this court. This court say:

"In all prosecutions for libel the jury have the right to determine, at their discretion, the law and the fact, and therefore the instructions of the court are not to bind the consciences of the jury, but only to inform their judgments. Under sec. 326 of the criminal code the jury trying the case exercised the right permitted by the statute of stating in their finding the name of the prosecutor, and that the prosecution was instituted without probable cause and from malicious motives. The court had no power to set aside the verdict in such a case and it was equally powerless to set aside a part thereof. Therefore, in the absence of such power, the order of the court was erroneous and must be reversed."

Counsel for plaintiff in error criticise this decision and very earnestly inquires "why the trial court had no power to set aside a part of the verdict." The reason is an obvious one; it is because a statute of the State expressly gives the jury in such an action the right, power, and discretion to determine the law and the fact for themselves. Counsel attack this provision of the statute and say it is unconstitutional and void, but he forgets that within his
32 memory the practice in criminal cases in almost all, if not all, of the States was for the jury to pass upon the law and the facts. The force of another universal practice of courts everywhere ought to be adverted to, and that is when a jury return a verdict of not guilty in a criminal case the trial court has no power to set it aside or modify it in any respect. These findings against the prosecuting witness were a part of a verdict of a jury in a criminal case wherein express power by statutory enactment is given a jury to determine both the law and the facts. The trial court has no power to interfere with that verdict in any prejudicial respect and this court is as powerless as the court below.

2. The constitutionality of the other statute has been upheld by this court in the case of *In re* Ebenhack, 17 Kas., 618, decided many years ago.

3. It is not necessary for us to attempt a construction of sections 252 and 326 of the criminal code, as there was no motion to retax the costs filed in the court below, and the record discloses no ruling on that question. It is true that there is a statement made by the clerk attached to the record long after its filing in this court showing that the full amount of costs accruing in the case is $1,585.90, and of this it is said that $1,181 are the costs of prosecution and $404.90 of the defense, but we are governed by the record, and that recites a judgment for costs against the prosecuting witness of $1,053.40.

All that we can do in the present condition of the record on the

question of costs is to recommend that the judgment for the amount of costs named therein be affirmed.

By the COURT: It is so ordered.

All the justices concurring.

A true copy.
Attest:

____ ____,
Clerk Supreme Court.

33 And afterwards, on the 12th day of March, A. D. 1892, there was filed in the office of the clerk of the supreme court of the State of Kansas a writ of error in the above-entitled cause, the original of which is hereunto attached and is the words and figures as follows, to wit:

34 In the Matter of the Appeal of S. LOWE, Prosecuting Witness, from the Judgment against Him for Costs in The State of Kansas *vs.* F. Keefer.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of Kansas, Greeting:

Because *of* the records and proceedings, and also in the rendition of the judgment which is in the said supreme court of the State of Kansas, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said matter of the appeal of S. Lowe, prosecuting witness, from the judgment against him for costs, in The State of Kansas *vs.* F. Keefer, wherein was drawn in question the validity of a statute of said State, to wit, the validity of section 326, chapter 82, procedure criminal, General Statutes of Kansas, on the ground of said statute being repugnant to the Constitution of the United States, and the decision was in favor of the validity of said statute, an alleged manifest error hath happened, to the great damage of the said S. Lowe, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and
35 openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court, this 12th day of March, in the year of our Lord one thousand eight hundred and ninety-two.

Issued at office, in the city of Topeka, with the seal of the circuit court of the United States for the district of Kansas, and dated as aforesaid.

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862. }

GEO. F. SHARITT, *Clerk.*

Allowed and approved this 10th day of March, A. D. 1892.

ALBERT H. HORTON,
Chief Justice of the Supreme Court of the State of Kansas.

[Endorsed:] 7236. Writ of error. Filed Mar. 12, 1892. C. J. Brown, clerk sup. court.

36 And also, on the 28th day of March, 1892, there was filed in the office of the clerk of the supreme court of the State of Kansas an appeal bond in the above-entitled cause; which said bond is in words and figures as follows, to wit:

Know all men by these presents that we, S. Lowe, as principal, and J. K. Tulloss and J. I. Crouse, as sureties, all of the county of Chautauqua and State of Kansas, are held and firmly bound unto the State of Kansas in the just and full sum of two hundred dollars ($200.00), to be paid to the said State of Kansas; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly, by these presents.

Sealed with our seals and dated the 10th day of March, A. D. 1892.

Whereas, at the January term, 1891, of the supreme court of the State of Kansas, in a suit or proceeding then pending in said court entitled "In the matter of the appeal of S. Lowe, prosecuting witness, from the judgment against him for costs in The State of Kansas *vs.* F. Keefer," judgment and decision was rendered against the said S. Lowe, and said S. Lowe having obtained a writ of error to the Supreme Court of the United States and filed a copy thereof in the clerk's office of said court to reverse the decision and judgment in the aforesaid suit or proceeding, and a citation directed to the said State of Kansas, citing and admonishing — to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said S. Lowe shall prosecute his writ to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and effect.

S. LOWE. [SEAL.]
J. K. TULLOSS. [SEAL.]
J. I. CROUSE. [SEAL.]

Approved this 23rd day of April, A. D. 1892.

ALBERT H. HORTON,
Chief Justice of the Supreme Court of the State of Kansas.

7236. Bond. Filed Mar. 28, 1892. C. J. Brown, clerk supreme court.

37 And also, on the 12th day of March, A. D. 1892, there was filed in the office of the clerk of the supreme court of the State of Kansas a citation in the above-entitled cause, the original of which is hereunto attached and is in the words and figures as follows, to wit:

38 S. LOWE, Plaintiff in Error,
vs.
THE STATE OF KANSAS, Defendant in Error. } Citation.

The United States of America to the State of Kansas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, wherein S. Lowe is plaintiff in error and The State of Kansas is defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Albert H. Horton, chief justice of the supreme court of the State of Kansas, this 23d day of April, A. D. 1892.

ALBERT H. HORTON,
Chief Justice.

Topeka, Kansas.

Service of the within citation upon the undersigned is hereby acknowledged this the — day of April, A. D. 1892.

LYMAN U. HUMPHREY,
Governor of the State of Kansas.

JOHN N. IVES,
Attorney General.

[Endorsed:] 7236. Citation. Filed Mar. 12, 1892. C. J. Brown, clerk sup. court.

39 And afterwards and on the 6th day of February, A. D. 1892, the same being one of the regular judicial days of the January term, 1892, of the supreme court of the State of Kansas, before said court, in session at the supreme court room, in the city of Topeka—present, Honorable Albert H. Horton, chief justice; Honorable Daniel M. Valentine and Honorable William A. Johnston, associate justices, and C. J. Brown, clerk of said court—the fol-

lowing proceeding, among others, was had and remains of record as follows, to wit:

In the Matter of the Appeal of S. LOWE, Prosecuting Witness, from the Judgment against Him for Costs. No. 7236.

Now comes on for decision the motion for a rehearing of this cause, and thereupon it is ordered that said motion be overruled. Opinion "*per curiam.*"

40 And also, on the 6th day of February, 1892, there was filed in the office of the clerk of the supreme court of the State of Kansas the opinion of the court, overruling the said motion for a rehearing, which is in the words and figures as follows, to wit:

41 7236.

In the Matter of the Appeal of S. LOWE, Prosecuting Witness, from the Judgment against Him for Costs.

Appeal from Elk county. Motion for rehearing. Motion overruled.

Opinion.

Per curiam:

The contention in this case is really over the constitutionality of the statute permitting a prosecuting witness to be committed for his failure to pay costs when the jury find the defendant not guilty and also find that the prosecution was instituted from malicious motives and without probable cause. Sec. 326 of the Criminal Code.

Sec. 275, chap. 31, Gen'l Stats. of 1868 (sec. 309 of the crimes act, par. 2449, Gen'l Stats. of 1889), is also referred to. An argument is presented against its constitutionality; but we need refer only to sec. 326 of the Criminal Code to dispose of the motion now pending.

The constitutionality of this statute is upheld in *In re* Ebenhack, 17 Kas., 618, decided in 1877, about fifteen years ago. Mr. Justice Brewer delivered the opinion, and, among other things, said: "That the prosecuting witness by coming into court and filing his complaint submits himself to the jurisdiction of the justice, and at the same time that the question of the guilt of the person, by his affidavit charged with crime, is tried, his own conduct in the premises is inquired into. True, he is not upon the record as a party plaintiff or defendant; but the prosecution is instituted at his instance, and he appears upon the record as the complaining party. Many civil proceedings were formerly
42 in the name of the State upon the relation of some one. * * * It is true also that no formal accusation is presented against the complainant upon which he is tried and found guilty, and that the first written statement of his wrong is in the

finding and order, but the same is equally true in many cases in commitments for contempt. There often the first writing is the order of the court committing the offender for the contempt. The proceeding is summary, but it is clear that it is due process of law, and that the offender has had his day in court. Indeed, it may well be considered that he who maliciously or without probable cause invokes the process of a court to oppress and wrong an innocent party by placing him under arrest and upon trial for violation of law is guilty of a contempt of court." The present case was decided at our January term for 1891 in obedience to the Ebenhack case. That decision has established for a long time a rule opposite to the decision referred to in State *vs.* Ensign, 11 Neb., 529. We cannot now depart from the Ebenhack case without overruling various subsequent decisions, and we are not willing to do so.

If sec. 326 of the Criminal Code as construed works injustice in any case, the legislature has ample authority to interfere. The decisions of this court have been uniform since *In re* Ebenhack was decided, and we prefer to adhere to it.

After a defendant is acquitted the State is not entitled to a new trial before a jury as to which party must pay the costs.

The prosecuting witness is so connected with the State in the trial that, after the acquittal of the defendant, he cannot demand a retrial upon the evidence before another jury. If costs are improperly taxed by the court after the acquittal of the defend-
43 ant, of course a motion can be made for the retaxation and a proper inquiry may be had thereon.

In this case it appears that the district court approved the verdict of acquittal and also the finding of the jury against the prosecuting witness; therefore, in this case, the court below pronounced judgment of acquittal and for the commitment of the prosecuting witness in accordance with its own opinion, not merely the opinion of the jury.

The motion for a rehearing will be overruled.

44 In the Supreme Court of the State of Kansas.

I, C. J. Brown, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, correct, and complete transcript (with the exception of the testimony of witnesses and the certified bill of costs in the trial court) of all pleadings and papers filed and of all proceedings had in the above-entitled cause as the same remain on file and of record in my office.

Witness my hand and the seal of the supreme court affixed hereto, at my office, in Topeka, this 19th day of August, 1892.

Seal Supreme Court, State of Kansas.

C. J. BROWN,
Clerk of the Supreme Court of the State of Kansas.

Endorsed on cover: Case No. 15,165. Kansas supreme court. Term No., 174. S. Lowe, plaintiff in error, *vs.* The State of Kansas. Filed October 7th, 1892.

FILED
JAN 3 1896
JAMES H. McKENNEY,
CLERK

IN THE SUPREME COURT

— OF THE —

UNITED STATES,

AND OF THE

OCTOBER TERM, A. D. 1895.

NO. 174.

S. LOWE, PLAINTIFF IN ERROR,

VS.

THE STATE OF KANSAS, DEFENDANT.

BRIEF OF APPELLANT.

WEEKLY TIMES-STAR Print, Sedan, Kansas.

IN THE

SUPREME COURT OF THE UNITED STATES,

AND OF THE

OCTOBER TERM, A. D. 1895.

No. 174.

S. LOWE, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS, DEFENDANT.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This case was originally commenced by filing an information against the defendant F. Keefer in the District Court of Chautauqua county, Kansas, the appellant S. Lowe being the prosecuting witness, and the case was taken thence by change of venue to Elk county, where the case was tried at the October Term, A. D., 1890.

This information charges a criminal libel by the defendant upon the appellant; that the defendant on the 23d day of August A. D. 1889 unlawfully, wilfully and maliciously made, composed and circulated concerning appellant, a certain false, malicious, defamatory and scandalous letter, writing and communication set forth in said information, a full copy of which is given in the printed transcript of the record filed in this court on page 2 paragraph 4. The cause was tried in the District Court of Elk county and a verdict returned

finding the defendant not guilty and that the prosecution was instituted without probable cause and from malicious motives and stating the name of the prosecuting witness to be S. Lowe. See printed transcript of record page 14, paragraph 17.

Thereupon the defendant Keefer was duly discharged from custody without day.

On the 17th day of October, A. D. 1890, the appellant Lowe filed his motion that so much of said verdict as related to him as prosecuting witness be set aside by the court and for a new trial for the following reasons:

1st. That he had not been heard, and could not be heard, either in person or by counsel, in his own defense touching the matter and things above mentioned as stated and contained in said verdict being neither plaintiff or defendant in the action as tried.

2d, 3d, 4th, 5th, and 6th. That the court erred in matters of law to the prejudice of Lowe in permitting certain depositions to be read to the jury and at the same time saying to and instructing the jury concerning the same, as set forth in the printed record, on pages 15, 16, and 17 in paragraphs 18 and 19.

And also 6th, that section 309, of the statutes of Kansas quoted by the Court in those instructions to the jury concerning said depositions giving the jury in criminal libel cases, "*the right to determine, at their discretion the law and the fact*," that that section of the statutes of Kansas is not the law of the land, but that the same is contrary to the genius of the institutions of the state of Kansas, and unconstitutional, null and void. See printed record page 17, clause numbered 6.

On the 18th day of October, 1890, said motion was overruled by the Court to which the appellant Lowe excepted and thereupon filed his motion in arrest of judgment, for the reasons set forth in his said motion for a new trial, which second motion was also overruled, and appellant excepted.

And thereupon the Court pronounced judgment upon said verdict that Lowe pay *all costs* of said action taxed at the sum of $1585.90, and that he be committed to the jail of Elk county, Kansas, until said costs are paid or until he execute a good and sufficient bond, with two or more sureties, in the sum of $2500.00 to be approved by the sheriff of Elk county, Kansas, conditioned that he pay all costs in the said action within six months from the date of said judgment, to which said judgment appellant, at the time, duly excepted.

An appeal was duly taken to the Supreme Court of the state of Kansas.

Said appeal was heard by the Supreme Court Commissioners, by order of the judges of the Supreme Court, an opinion written by Simpson Commissioner affirming the judgment of the trial court all the judges of the Supreme Court concurring therein, and it was ordered by the Court that the judgment below be affirmed. See printed record of opinion and judgment, pages 23, 24, 25 and 26 paragraphs 29, 30, 31 and 32.

Thereupon appellant entered his motion for a rehearing before the judges of said Supreme Court themselves, filed an additional brief and, upon hearing, said judges overruled said motion and filed their opinion thereon, which is found in the printed record, pages 29 and 30, paragraphs 41, 42 and 43.

Appellant then perfected his appeal to this Court.

ARGUMENT.

We now present to the Court the section of the criminal law under which Lowe was convicted and adjudged to pay costs, to-wit: "Whenever it shall "appear to the Court or jury trying the case, that the prosecution has been "instituted without probable cause and from malicious motives, the name of

"the prosecutor *shall be ascertained* and stated in the finding and such prose-
"cutor shall be adjudged to pay the costs and may be committed to the county
"jail until the same are paid, or secured to be paid. Sec. 326 Chap. 82 Procedure
"Criminal. Gen. Statutes 1868. Took effect Oct. 31, 1868."

We also present the corresponding section in procedure criminal tried before Justices of the Peace, to wit: "Whenever the defendant tried under the "provisions of this act, shall be acquitted, he shall be immediately discharged, "and if the justice or jury trying the case shall state in the finding that the "complaint was malicious *or* without probable cause, the justice shall enter "judgment against the complainant *for all costs that shall have accured* in the "proceedings had upon such complaint, and shall commit such complainant to "jail until such costs be paid, unless he shall execute a bond to the state, in "double the amount thereof, with security satisfactory to the justice, that he "will pay such judgment within thirty days after the date of its rendition."—Gen. Stat. 1868 Chap. 83 Sec. 18. Took effect Oct. 31, 1868.

It will be observed that the provisions for proceedings against complaining witnesses in these two sections are almost identical, saving that the former directs judgment "to pay the costs" and the latter that he pay "*all costs that shall have accured in the proceedings*" &c., and that the former section states that the complaining witness may be committed "*until the same* (costs) *are paid or secured to be paid*," without stating how the costs shall be secured, nothing about bond and security, and nothing as to the time given for payment as in the justice's act where the amount of the bond is stated and the time given within which costs shall be paid, as 30 days.

The reason why we quote the two sections is, that in the case of In re Ebenhack, 17 Kas. 618, decided in our Supreme Court, it was held that the section copied above from the Justice's act is constitutional; that the complaining witness had had due course of law, that the verdict of a jury against him under that section could not be set aside by any court for any reason whatever; no matter if contrary to the law and evidence, and that the Supreme Court has no power to relieve in such case.

Also, a statute of Nebraska identical in every word excepting two with the Kansas Justice Act section was held to be null and void by the Supreme Court of Nebraska in State vs. Ensign reported in 11 Neb. 529, the Nebraska act directing bond to the state "of Nebraska" instead of "to the state" merely, as in the Kansas act.

We quote the Kansas and Nebraska sections from the criminal procedure in the two states for the reason that the Supreme Court of Nebraska decided there was no due course of law, section unconstitutional, in State vs Ensign, and the Supreme Court of Kansas, held there *was* due course of law, section constitutional &c. and for the further reason that if the section in the Justice's act in Kansas is unconstitutional the corresponding section under which Lowe was adjudged guilty in the district court, though reading a little different and lacking provisions as to bond, amount, time of payment, &c? must *also* be unconstitutional, and because the decision against Lowe in our supreme Court, merely followed In re Ebenhack and gave no reason whatever for following that precedent, excepting that the court had held the law unconstitutional in In re Ebenhack, and saying "We cannot now depart from the In re Ebenhack case, without overruling various subsequent decisions, and we are not willing to do so." (See printed copy of record page 30 paragraph 42.) That was all the reason given and yet, strange as it may appear, the In re Ebenhack case and this Lowe case are the only cases wherein the constitutionality of the

act was ever directly called in question and argued in our Supreme Court of Kansas, as we will hereinafter show in this brief.

We said, in our first brief filed in our Supreme Court in this case, as to asking the court to overrule "In re Ebenhack, and hold section 326, ch. 82 Gen. Stat. Kansas, unconstitutional and as violating the constitution of the state of Kansas and of the United States:

"We approach the subject with all due respect for the decision of this "Court, in *in re* Ebenhack 17, Kas. 618. save that we do not consider that said "decision is correct.

"We further say that we are fully sensible of the gravity of the task of ask-"ing this Court to reverse its decision in that case, but we believe that our duty "to our client makes it incumbent upon us to present our case as stongly as we "honestly and fairly can.

"Chancellor Kent, in his great work, Kent's Commentaries, Vol. I. page 487, "says: 'But I wish not to be understood to press too strongly the doctrine of "'*stare decisis*, when I recollect that there are more than one thousand cases to "'be pointed out in the English and American books of reports, which have "'been overruled, doubted, or limited in their application. It is probable that "'the records of many of the Courts of this country are replete with hasty and "'crude decisions; and that such cases ought to be examined without fear, "'and revised without reluctance rather than to have the character of our law "'impaired, and the beauty and harmony of the system destroyed by the per-"'petuity of error.'

"If there were over a thousand such cases more than fifty years ago, how "many thousand may there not be now with an increase of population to more "than five fold ?"

We might have added to what we quoted from Chancellor Kent's work a reference to the remarkable case of Adams County, Iowa, vs. The American Emigrant Society of Connecticut tried in one of the federal courts of Iowa, with a decision in favor of plaintiff and declaring a sale of swamp lands sold by that county to defendant null and void. An appeal was taken to this court, and the decision of the court below confirmed. Then defendant was heard again on motion for a rehearing and this court overruled the motion, when defendant employed Hon. Benj. F. Butler to see if he, as a last resort could do anything. He appeared in this Court and asked leave to file still another motion for a rehearing, which was granted upon his solemn statement to the court that a great mistake had been made by this court upon each hearing and that if the court granted still another hearing he would undertake to show the mistake so repeatedly made against the interests of his client, and this court granted the leave.

Upon the hearing this court reversed their former several decisions and rendered judgment in favor of defendant, leaving its title to the lands purchased of plaintiff good.

One of the Justices of this court said to Mr. Butler that this court had made a great mistake in all former decisions only to be accounted for by the haste with which the court had to do its work, and expressed his sincere gratification to Mr. Butler, that the latter had so persisted in getting still another rehearing of the case, against the practice and rules of this court.

In our first brief in our supreme court we quoted and commented upon a part of Chief Justice Brewer's opinion in In re Ebenhack, as follows:

"The next to last paragraph in the decision in In re Ebenhack, 17th Kan. page 618, reads as follows:

'Again it is said that this is in conflict with section 16 of our bill of rights 'no person shall be imprisoned for debt except in cases of fraud.' But these 'costs are cast upon him as a penalty—they do not constitute strictly and simply 'a debt, in the technical sense of the word, any more than the fine imposed 'upon a party convicted of assault and battery, is a debt. The legislature has 'in effect declared that an unwarranted appeal, in this class of cases, to the 'criminal law, is itself a violation of law, and subjects the offender to punish-'ment and the penalty imposed is the costs of the unwarranted proceedings 'Shields vs Com'rs. of Shawnee County, 5 Kan. 590: State vs Donnell, 11 Iowa '462: State vs Darr, 63 N. C. 516.

Now we agree that this paragraph is eminently true and very correctly states the law in every respect, so far as it goes, and we are very much gratified that this Court has in that decision stated one of the grounds of our argument authoritatively, so that we are, as to a part of our reasoning, without fear of being wrong. It establishes, in our minds, that he who, as prosecuting witness, institutes a criminal proceeding without probable cause and from malicious motives not only commits a great and vexatious moral wrong but one which may be declared by the legislature a public offense, a misdemeanor which is to be punished by making him, under pain of imprisonment, pay the costs which he caused to be made in that willful unwarrantable way. But we earnestly and with confidence claim that anyone accused of that offense should have a fair, impartial trial, with all rights and privileges of defense, in the same due course of law, that the most petty offenders or the greatest criminal is entitled to with all the safe guards provided in *other* criminal proceedings for the protection of the innocent, to the end that if innocent he may not suffer.

We also believe that the course of proceedings against prosecuting witnesses prescribed by Sec. 326 is hasty, harsh and cruel and in character, a tyrannical, proceeding and so viewed by a great vast majority of the legal profession, both, on the bench and at the bar; so much so that most of the legal profession wonder how such things can legally be.

Therefore our courts should, we think, patiently hear the last appeal of, perhaps, an innocent prosecuting witness, though of a very small class of citizens and their troubles or wrongs if any attracting little attention and therefore get little sympathy from the mass of their busy, bustling, fellow-citizens who, from the nature of things, are absorbed in their own affairs and troubles, their own hopes, enjoyments and ambitions, and a great many of these perhaps glad that they have no share of the costs to pay, in the way of taxes. Our judiciary is their only hope—they are too few to influence legislature with their little matter, legislatures not being often induced to action by complaint small in volume. They are always short of time in which to attend to even greater things.

We offer these observations as showing our sense of the need of most careful consideration of the question whether this section 326 is, in all its parts, constitutional—the law of the land.

It indirectly creates, ordains, the offense, directs the manner of proceedure in toto for conviction of that offense and the penalty or punishment thereof. If there is any validity in the provisions of "that section, we argue that it consists in the declaratory and vindicatory parts. It *may* be the law that an offense and its punishment is legally made a part of our criminal code by that section, aside from the mode of proceedure to conviction, though we doubt it, if a part of the section is unconstitutional, on the grounds set forth in Cooley's

Constitutional Limitations pages 214, 215, 216 and 219; for that part of the section is so connected with, and dependent, upon the other parts of the section and 'they are so essentially and inseparably connected in substance, so mutually dependent on each other, being all contained in one single, unbroken sentence, that a part left out, the remainder will not contain either reason or grammatical sense, and hence all must fall together.

But it is not material that we deny that proposition. Our objection is to the mode of proceedure—to the summary conviction of the offender. If the statute declares an offense, and provides a punishment, the laws of the State of Kansas provide another and a common mode of proceedure, to which mode, of course, there can be no possible legal objection.

Sec. 307, chapter 31, crimes and punishments, provides: 'Whenever any 'fine, penalty or forfeiture is or may be inflicted by any statute of this state, for 'any offense, the same may be recovered by indictment (except as in the next 'section provided), notwithstanding another or different remedy for the re-'covery of the same may be specified in the act imposing the fine, penalty or 'forfeiture. Provided, that in all cases the fine, penalty or forfeiture shall go 'to the state, county, corporation, person or persons, to whom the act imposing 'the same declares it shall accrue'.

These costs, this 'penalty' as it is truly called by Brewer J. in the case we have quoted, may also be collected of the prosecuting witness by proceeding on information for Sec. 66, Chap. 82. Proceedure Criminal provides: 'Offenses 'may be prosecuted in the Court having jurisdiction either by indictment or 'information as hereinafter provided.'

But it may be said that an act or proceeding of a prosecuting witness, like the case before this court, is not an offense. If not an offense, why is the 'offender' subjected to punishment for a 'violation of law' and 'the *penalty* imposed' on him of paying the 'costs of the unwarrantable proceedings?' as stated in the above quoted opinion of Brewer J. We think that this question is undoubtedly settled by section 2, of chapter 82, Proceeding criminal, and that it is an offense under our criminal code, for that section reads as follows:

'Sec. 2. A public offense, within the meaning of this or any other statute, 'is an act or omission for which the laws of this state prescribe a punish-'ment.'

Will anyone deny that it is a punishment to *sentence* a prosecuting witness to pay over $1,500.00 costs and in some cases perhaps double that amount, and also imprison him in jail until he does so? There are but very few fines for misdemeanors which exceed $500.00, and less yet in number which may exceed $1,000.00. Such an idea is not only contrary to reason, but to the plain decision of this Court delivered by Justice Brewer in in re Ebenhack.

Further it may be objected that even if the offense be a public offense and punishable, or which might be made punishable, by way of indictment or information, yet the legislature may direct another, a different and summary mode of conviction and punishment and so enact the law in and by the context thereof, that it can only be enforced in the particular summary way, directed by the one sentence of the statute declaring the offense, prescribing the mode of proceedure for conviction and also the penalty; thus precluding the usual, ordinary course by indictment or information, depriving the prosecuting witness of the protection of the Court by setting aside the verdict, if contrary to the law and evidence, and nearly all the safeguards provided in other criminal trials, by directing a less troublesome, a more convenient and cheaper remedy That is the practice, the argument and reasoning of the mob.

If the legislature, merely because having the power, saw fit to do so, then the act of the legislature is a tyrannical, arbitrary fiat and as such null and void, not being the exercise of legislative power. (See Cooley's Cons. Lim., pages 211, 212, 213 and note 1).

It can make no difference that the penalty is not denominated in the law, a fine, but stated as 'the costs of prosecution,' for the punishment—the amount to be paid—is the same, the imprisonment until paid, the same, and the damage to the prosecuting witness, the substance of the sentence, the same the pronouncing of judgment by the Court in case he believes the verdict against the law and the evidence just as ungracious an act, just as abhorrant to justice, just as revolting to anyone's sense of right as such a verdict and judgment upon it would be in any other case, civil or criminal."

We then proceeded in that brief to show, as we thought, the failure of the reasoning in support of this law used by Chief Justice Brewer in In re Ebenhack. And we now state that if there is any argument in any case which establishes the validity of this section, as affording due process or course of law, and "the equal protection of the law" as secured to a citizen by the constitution of the State of Kansas, and the constitution of the United States, 14th Amendment, then the argument of Justice Brewer in In re Ebenhack is that argument for several reasons.

1st :—It was written by an eminent judge of our state and had the concurrence of all the associate justices.

2nd :—It was, it is true, written some 20 years ago, but by one then considered the leading judicial luminary of the state and one who has since been accorded by all, to be a great jurist and received the reward of his great capacity and learning in repeated promotions to the highest positions.

3rd :—It is the most minute and careful defense of such or a similar proceeding against a prosecuting witness which has emanated from a Court.

We said in our brief, of In re Ebenhack :

"This court decided in In re Ebenhack that the imprisonment of the prosecuting witness, if he failed to pay the costs adjudged against him or give security for their payment, is constitutional and valid, that it would be upon due process of law and after he had his day in court, and that section 18, of Chap. 83 of the Gen'l Statutes is constitutional and valid. If so, then section 326 of Chap. 82 is constitutional and valid, and if not so, then the latter section is unconstitutional, null and void. The reasons given for the conclusion to which the Court arrived, we will state and examine. The first is that by coming into Court as a prosecuting witness he submits to the jurisdiction of the Court. Jurisdiction of the Court to do what ? The answer can only be that he submits himself to the authority of the Court, upon the verdict rendered, to adjudge the costs in the case against him and unless he pays them or secures them to be paid, to imprison him until paid. This as argument begs the question. It assumes that Court has the jurisdiction to so deal with the prosecuting witness, because he comes into the Court as such, and the Legislature has directed or allows him so to be dealt with.

All that can be said as to his submitting himself to the jurisdiction of the Court, truly and logically is, that he submits himself to the lawful authority and power of the Court, as all do who come into Court, but does not submit to whatever the Legislature may have directed the jury and Court to do with him by a statute null and void. The very question is whether the Court has jurisdiction to thus deal with a prosecuting witness, and to say that coming into Court as prosecuting witness is any evidence or affords any argument that

whatever the Court may do with him under the provisions of a statute, is not against his constitutional rights, is assuming in the first place, that the statutes thus empowering the Court is a valid, constitutional act.

The next part of the argument is that "at the same time that the question of the guilt of the person by his affi lavit charged with crime, is tried, his own conduct in the premises is enquired into." Yes, sometimes it is and some times it is not. But suppose his own conduct is enquired into. That is strictly necessary in many cases, in order that the jury may understand the facts of the transaction as a guide to their decision concerning the guilt of the defendant. But suppose in inquiring into the conduct of a complaining witness, it should appear, as it sometimes does, that he had committed an assault and battery on the defendant instead of an assault and battery by the defendant on the complaining witness or had committed any other crime of which he had accused the defendant, some felony for instance, and a section of the statutes should provide that if the jury so find the Court should proceed to render judgment against the prosecuting witness for the usual punishment. Then also, he would have submitted to the jurisdiction of the Court and his own conduct had been enquired into. Would that show that such a statute would be constitutional, that the prosecuting witness had had his day in Court and such judgment be upon due process of law? If not in that case why in this?

It may be said in such case that the statute has provided an *exclusive* way and mode of convicting a citizen of assault and battery, and other crimes. That might be true but does the constitutionality of this law, as to prosecuting witnesses, depend on the fact that no other statute provides for any proceedings against him?

The question is not, whether a prosecuting witness has come into Court, and has his conduct inquired into, in a measure, but, whether such being the fact the Court can lawfully punish him for a criminal offense in this arbitrary, one sided, summary way; deprive him of the right of every other offender, to have a verdict contrary to the law and evidence, set aside by the court and the court not be obliged to pronounce 'sentence' against one whom, that court believes has not commenced a prosecution without probable cause and from malicious motives, or either. Is it not a travesty upon the administration of justice when it is done? Yet it is often done.

Some times citizens having innocent knowledge of crime are bound to divulge it and if they refuse to do so are themselves thereby made guilty of a crime; if such a citizen, having such knowledge becomes the complaining witness he but performs his duty under the law and according to all authorities is entitled to more than the credit of the average citizen. Yet he might in times of great political excitement, institute a criminal proceeding for stuffing ballot boxes, prove the offense by his own testimony and that of others, and yet have verdict and judgment against him and be sent to jail as a reward for his patriotism, when he could not possibly be convicted and suffer judgment if tried in the ordinary course of criminal proceedings before a judge not utterly corrupt.

This may be said to be a good argument to submit to the legislature but it is, at the same time, a solemn fact, and the question 'Will not down' whether it is constitutional so to do. No other offender is tried and punished in this manner and with such restriction as is the prosecuting witness, and none, other than prosecuting witnesses, run such risks of conviction when innocent and that without remedy if this law is valid.

To quote further from the opinion under discussion: 'Many civil proceed-

ings were formerly in the name of the state upon the relation of some one. Well, this case is not a civil proceeding but a criminal one, and many things may be done in civil proceedings which cannot be done in those criminal. Also, it is said as to such civil proceedings: 'The party plaintiff was the state 'but the relator was none the less within the jurisdiction of the Court, and 'might be reached and concluded by its order.' Yes, it was all right just and proper and constitutional but does it follow that this mode of proceeding is such, because that was! It is then stated that the first written statement against the complaining witness is the finding of the verdict and the order making the prosecuting witness a convicted criminal. That is true and it is also true that often the first idea that he has that he has done anything in the least out of the way is the thunderclap that knocks him helpless and like unto him spoken of in the Holy Scriptures, he is 'Suddenly destroyed and that 'without remedy.' For the verdict cannot be set aside in any case, nor a 'part of it'—right or wrong, it *must* stand.

Justice Brewer further says: 'The process is summary; but it is clear 'that it is due process of law and that the offender has had his day in Court.' Clear for the reasons theretofore given? It is very clear in our minds that he has had a day in Court or a part of one at least, and a process of law, as directed by the act of the legislature, but in case he is innocent he certainly has had a fatal day and a short shrift. The opinion then states that: 'Indeed it may well 'be considered that he who maliciously, or without probable cause invokes the 'process of a Court to oppress and wrong an innocent party by placing him un-'der arrest and upon trial for violation of law, is guilty of a contempt of Court.'

Well may not the same be said of those who invoke the process of a Court to wrongfully and willfully—vex and harass a defendant with a civil action? Does he not too of his own wrong seek 'to prostitute the powers of the Court 'to the injury of another'? Is not that also conduct which merits, as it receives, the censure of all Courts and the condemnation of all persons'? Most assuredly. Is not the Court the judge of contempt and the sole judge too? Here the jury have found the fact whatever it is, contempt of Court or otherwise, and the Court is not allowed to question the finding. Does the Court intimate that the prosecuting witness is punished as for contempt? If not, what does it all matter and how do these considerations tend to show that this law is constitutional? Procedings for contempt are in due process of law undoubtedly, but it is absolutely necessary for what may be called the self defense of the Court—for the very existence of the Court as a Court transacting business—and the fact of that absolute necessity makes the action of the Court in the case of contempt, legal, constitutional and right, and the person committing contempt of Court has all the rights which the interests of the people and the administration of justice can allow. He is subject to punishment, but he has, which the prosecuting witness has not, the protection of the integrity, discretion, wisdom, sense of justice and inclination to mercy of men least likely, as a class, of all on the face of the earth, to do him wrong, being rarely other than considerate, fair and just. Of the three branches of our government the judiciary is the pride and trust of the people.

Besides this our law limits the pecuniary punishment for contempt to $100.00 in our District Courts no matter how grave the offense.

We are impressed in reading the part of the opinion in this case treating of contempt, and particularly the last two sentences that that part of the argument is founded upon the assumption that all prosecuting witnesses who are convicted by the verdict of the jury and consequently sentenced by the Court

are guilty, and therefore have had their day in Court, and due process of law; and if this were true it would not so much matter if they were treated a little rough—the same too in case of all hung for murder by mobs—but what becomes of that part of the argument in case the prosecuting witness is innocent, has instituted a prosecution with not merely probable, but surely with good, just cause, and not from malicious motives? If it is any argument that the prosecuting witness has had due process of law and his day in Court in the former case, it is an equally good argument that he has had not the latter.

What is the chief value of having due course of law and a day in court if not that the innocent may more likely escape punishment?

But the prosecuting witness is not punished as for contempt for the case is tried by a jury; and the Court having no say as to the contempt we conclude there is none, at least so far as the legal character of the proceedings is concerned.

And we are unable, in reading the three cases cited as precedents, or authorities, to find anything throwing light upon the question of the validity or constitutionality of the section of our statute concerning prosecuting witnesses.

The first case cited in In re Ebenhack, is that of Shields vs Commr's. of Shawnee County 5 Kan. 590. In that case it is decided that the county of Shawnee was not liable to pay Shields his fees for service as constable rendered in an examination before a justice of a person charged with crime, the person so charged having been discharged for want of evidence to convict or bind over, neither the prosecuting witness nor the defendant having been adjudged to pay the cost; that the justice ought to have adjudged that the prosecuting witness should pay the costs under the provisions of Sec. 13, Chap 39, G. S. as amended &c. That section states merely that in such cases 'the prosecuting 'witness shall be *liable* for costs' and does not, like Sec. 18, Chap. 83, criminal proceedure before justices and Secs. 252 and 326, Chap. 82, criminal proceedure in District Courts provide for imprisonment of prosecuting witnesses. Secs. 252 and 326, Chap. 82, were not referred to in that case, and no constitutional questions were mentioned, discussed or decided as to any of the sections of our statute above mentioned.

The next case cited as a precedent and authority, is that of the State vs Donnell, 11 Iowa 452. The Iowa statutes corresponding to those in Kansas provide Sec. 5254, Chap. 13, in cases of preliminary examinations that if the prosecution is malicious or without probable cause the justice shall 'tax the 'costs against the complainant and render judgment therefor' and then *provides for an appeal from the judgment.* Sec. 4691, Chap. 52, trial before justices, provides that the justice shall 'if he is satisfied that the prosecution is mali-'cious or without probable cause, tax the costs against the prosecuting witness 'or render judgment therefor, from which he may appeal to the District Court.'

Sec. 4292, Chap. 15, concerning indictments, provides that if the indictment is at the instance of a private prosecutor his name must be endorsed by the grand jury on the indictment and the "Court trying the cause may award costs 'against the private prosecutor, if satisfied from all the circumstances that the 'prosecution was malicious or without probable cause.'

Also, the provisions of the Iowa statutes differ notably from our own in three respects:

1st. The Court, in every case and in no case the Jury, *decides the question of liability to pay costs.*

2nd. *In no case is the judgment enforced by imprisonment.*

3rd. In all cases there is an appeal allowed and the *case reviewed upon the evidence if desired.*

Such statutes might be constitutional, but we need neither admit nor deny as to that question, for the cases are not in *pari materia.*

In the cases cited which are now examining, the State vs Donnel 11 Iowa, 452, the Court decided two questions :

1st. That the order or judgment of the District Court was made in the absence of the prosecuting witness, yet as he was heard by the Court on his motion to set aside the order of judgment he had an opportunity to be heard.

2nd. As to the objection that the order was made without sufficient evidence to sustain it, the Court decided that the parties aggrieved should have had the evidence made of record and certified up to the Supreme Court, if upon such a question they desired the opinion of the Court.

Thus it appears that the question of the validity of the act of the legislature upon which the authority of the Court was based to render judgment for costs against the prosecuting witness was not presented to the Court and was not considered or passed upon at all in that case.

The last case cited is State vs Darr, 63 N. C., 516. It appears that the appellant in that case claimed that the judgment against him was rendered under the provisions of the wrong one of two statutes and that the appellate Court decided that the judgment was all right in that respect, and no constitutional objection was either presented, discussed or decided in that case.

We cannot see, though the fault may be our own, that we gain any help in the matter by consulting the cases cited by the Court in in re Ebenhack, those cases not appearing to have any relation to the question of the constitutionalty of our statute, and we respectfully suggest that in re Ebenhack is not one which throws much light, if any, upon our inquiry, whether this appellant has had 'due process of law', 'the equal protection of the laws', 'the full enjoyment' of his rights as an American citizen, and whether in this prosecution against him be has had all the rights secured to him by section 10, Bill of Rights, Constitution of the state of Kansas.

There are some other cases which have been decided by this Court which bear upon the present case, and to which we wish to call attention.

The case of the State vs Zimmerman, 31 Kan. 85, was a criminal libel action, the jury acquitted the defendant, found that the prosecution was instituted without probable cause and from malicious motives and on motion of the prosecuting witness, Zimmerman, the trial judge set aside the verdict against him and rendered judgment against the county of Leavenworth and the case was brought to this court on appeal. This Court decided that the trial Court had no power to set aside so much of the verdict as embraced the findings against Zimmerman and therefor 'the order of the Court was erroneous 'and must be reversed.'

The Court gives no reasons why the order of the court was erroneous—why the trial Court had no power to set aside a part of the verdict. Where two defendants are jointly tried and each found guilty, the Court can certainly set aside the part of the verdict as to one if the verdict to him be against the law and the evidence and let the part of the verdict as to the other stand. Of course the whole verdict in case of acquittal connot be set aside, for the defendant cannot be, a second time, put in jeopardy. But why had not the Court the power to set aside part of the verdict in the Zimmerman case ? There is no reason directly given and if there is any reason indirectly or inferentially given it must be in the statement that 'In all prosecutions for libel, the jury

'have the right to determine, at their discretion, the law and the fact; and there-'fore in such cases the instructions of the Court are not to bind the conscience 'of the jury, but only to inform their judgments.' Was that sentence placed in the decision for the reason that that case being a criminal libel case the jury had 'the right to determine at their discretion the law and the fact' concerning the prosecuting witness and his liability to pay costs as well as concerning the defendant and his liability for criminal libel ?

But the case of the State vs. Zimmerman is cited as a precedent in the State vs Forney, 31 Kan. 635, which was not a criminal libel case at all, but Forney was tried in the District Court of Chase County for larceny. The Jury found Forney not guilty, a verdict in the usual form against the prosecuting witness J. A. Smith, and judgment was rendered against him accordingly and he appealed. The grounds of the appeal are not stated, and the Court shortly disposed of the case by affirming the judgment stating the case to be within the authority of The State vs Zimmerman and citing the State vs Spencer, 81 N. C., 519 and the State vs Adams, 85 N. C. 560. No constitutional question is referred to in either of the last two cases in this Court or in either of those N. C. cases cited in the State vs Forney.

We think that the case, In re Ebenhack, 17 Kan., 518, deciding that Sec. 18, Chap. 83, Gen. Stat. is constitutional and valid is the only one affirming the validity of any of the several sections concerning sentencing prosecuting witnesses to pay cost and to imprisonment until paid and that the State vs Zimmerman, 31 Kan., 85, is the only case concerning the lack of power in the trial court to set aside a verdict against a prosecuting witness. These cases seem to declare the law of this state to be, that such convictions are constitutional and that when a verdict is rendered against a prosecuting witness, the Court *must* proceed to judgment against him, right or wrong, guilty or innocent, that he cannot be helped by the trial or appellate Court even when such verdict is against the law and the evidence, and the trial judge believes that, beyond doubt, he pronounces 'sentence' upon an innocent man.

We steadfastly fail to believe that any class of our fellow-citizens are lawfully placed in such a miserable condition.

The preamble of the constitution of the state of Kansas reads as follows :

"We, the people of the State of Kansas, grateful to Almighty God for our civil and religious privileges, in order to insure *the full enjoyment of our rights as American citizens*, do ordain and establish this constitution of the State of Kansas."

The constitution or the United States recites that the people of the United States ordained and established that constitution for the purposes, among others, of *establishing justice*, promoting the *general welfare*, and to secure the *blessings of liberty* to themselves and posterity.

Well, we say that the two preambles mean, in substance, the same thing so far as the natural, inherent, absolute and inalienable rights of an American citizen are concerned.

The provisions of Articles 5 and 6 in 1st amendment and in Sec. 1, 14th amendment to the constitution of the United States and those of the bill of rights, in the constitution of the state of Kansas in sections 1, 5 and 10 mean also in substance the same thing, and due process of law as mentioned in the 1st and 14th amendments to the constitution of the United States has the same exact meaning in all the states of this nation to-wit : Process according to the common law, because the constitution of the United States which can only be fully interpreted by the aid of the common law, is the su-

preme law of the land and the Courts of the United States proceed, and always have, in accordance with the common law; therefore there can be but one due process of law in this nation, whether proceedings be in the state of Nebraska or in the state of Kansas.

Our contention is, that our client Lowe has not had due process of law nor "the equal protection of the laws" and hence we must inquire what due process of law is, and also inquire whether the proceedings against him in Kansas were by that due process of law.

What is due process of law has been defined by several writers and in the course of several judicial decisions. Bouvier defines it as:

1st. "Law in its regular course of administration through courts of justice," and he cites 3 Story Const. 264, 261; 18 How. 272; 13 N. Y. 378.

2nd. C. J. Ruffin states the full significance of the words to be that statutes which would deprive a citizen of the rights of person or property without a regular trial according to the course and usage of the common law, would not be the law of the land. 4 Dev. No. C. 15.

Lastly we have a definition of the phrase given by the Supreme Court of the State of Kansas, which will we think be found to be in full accordance with the two others above quoted, to-wit:

"The phrase 'due process of law' means law in its regular course of administration, according to prescribed forms and in accordance with rules for the protection of individual rights." State vs. Whisner, 35 Kans. 271.

Now here are three definitions of the phrase "due process of Law" and we think that we can safely say that they are not contradictory, but perfectly consistent and as it were explanatory of each other; and when taken together do certainly give us a good interpretation of the import of the expression.

It is worthy of notice that in all these definitions the word "regular" is used, with others, as determinate, in part, of the meaning.

Now we think the meaning of the word "regular" as used in the above quoted definitions is stated by Webster in his second definition, which we will give:

"2nd. Governed by rule or rules; steady or uniform; in course, practice or occurrence; not subject to unexplained or irrational variation; returning at stated intervals; steadily pursued; orderly; methodical; periodical."

The first definition of Webster applies only to mere form or shape, not substance; as "a regular epic poem; a regular verse; a regular plan; a regular building;" and is in this case not applicable.

Judge Foster said in the case of Herman Zibold in the District Court of the United States for the district of Kansas:

"If the term 'due process of law' has no broader meaning than *process prescribed by an act of the legislature*, such construction would render the constitutional guarantee mere nonsense; for it would then mean that no state shall deprive a person of life, liberty or property unless such state shall choose to do so; that it has repeatedly and uniformly been adjudicated that the terms "due process of law" and "law of the land" have a broad and comprehensive meaning, and originated in that great bill of rights, Magna Charta, and operate as a restriction upon each branch of government, citing Murray's Lesee vs Land Co., 18 Howard 272; Davidson vs New Orleans, 96 U. S. 107; Exparte Virginia, 100 U. S. 346."

Judge Foster then states: "These words in the constitution have been defined in various terms by different courts, but all the definitions tend to the same general idea." He then quotes several opinions as tending to the same idea, as follows:

"Mr. Justice Edwards has said in one case: 'Due process of law undoubtedly means, in the due course of legal proceedings according to those rules and forms which have been established for the *protection of private rights*." Westervelt vs Gregg, 12 N. Y. 209.

"Mr. Justice Johnson, of the Supreme Court of the United States says: 'As to the words from Magna Charta incorporated in the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this; that they were intended to secure *the individual* from the arbitrary exercise of the powers of the government, *unrestrained by the established principles of private rights and distributive* justice." Bank of Columbia vs Oakley, 4 Wheat 235. This definition has been several times approved by this Court. United States vs. Cruishank, 92 U. S. 551; Hurtago vs California, 110 U. S. 527."

Judge Cooley says: "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such *safe-guards* for the *protection of individual rights* as those maxims prescribe for the class of cases to which the one in question belongs." Cooley's constitutional Limitations, 356; Wythamer vs People, 13 N. Y. 432; Taylor vs. Porter, 4 Hill 145.

He further continues: "With this general principal established and the meaning of these words defined, the difficulty remains of applying the principal to any particular case" and then states some cases of such particular application, and continuing says of them:

"These cases tend to establish the doctrine that the rules and forms known to the common law, in judicial proceedings, *not affecting the ultimate rights of the party*, are not necessarily guaranteed to a person under the constitution; and it has long been established that the remedial process of the law may be altered at the will of the legislature, so it does not impair a vested right, or cut off the remedy altogether. The words "due process of law", then *must be directed to something deeper* than the mere rules and forms by which courts administer justice."

"They evidently were intended to guarantee some real and substantial right to *life, liberty and property* as the ultimate result; and probably, to prohibit any arbitrary and oppressive proceedings by which the individual is deprived of either."

The learned judge then appears to state his practical conclusions on the matter by saying:

"*In any case we have to inquire if the person is imprisoned in violation of a due course of legal proceedings according to those settled maxims, rules and forms established for the protection of private rights, against the arbitrary exercise of power unrestricted by established principles applicable to such rights, and to the administration of justice.*"

We add one other extract from an opinion of Judge Crozier, judge of the First Judicial District of this state; 17. "The highest courts have found it impossible to formulate in advance what would be 'due process of law' in every case that might arise, but they do agree that a statute, the provisions of which would be in violation of the written or *unwritten* fundamental law of the land, would not be 'due process of law' however gigantic the evil sought to be remedied might be."

The sum and substance of all these different definitions of due process of law and which none of them dispute or deny is, this: That every man has the same right to protection, and in the same manner, in all respects, when on trial for any offense, that any other man has.

We say generally that Lowe has not had due course of law because Sec. 326 Chap. 82 General Statutes of Kansas 1868 under which he was, by a finding of a jury and judgment upon it by the Court, adjudged to pay costs or go to jail, is null and void, for the following reasons:

Every act of the legislative power contrary to the *true intent and meaning* of our state or national constitution, is *absolutely null and void;* that constitutions measure the powers of the rulers but *not the rights* of the governed; that there is a real spirit and meaning in constitutions in all governments like ours, not one merely imagined or supposed, but one which tends to protect and does protect the citizen in the possession of his chartered ultimate rights, which spirit and meaning are not altogether expressed in the words or terms *of any* of our constitutions and without which the written constitutions of this nation would be but lifeless things, lacking that power and vitality in many cases, necessary to secure the just and protecting interpretation of the written words; that of the three branches of our government, the executive, legislative, and the judicial—the legislature is most dangerous to the liberties of the people; that the safety of the people rests for its chief support upon the judicial powers of the government—in the enforcement of the people's constitutional, fundamental and ultimate rights by the Courts; that the judicial power is a co-equal and *perfectly independent* branch of the government, and that it is to stand in fear of naught in the administration of justice, save doing injustice to a citizen or denying unto him the prevention or the lawful redress of any wrong threateded or committed against him by others, that being the very object and purpose for which courts are instituted; that legislative acts that are contrary to natural rights, to the right principles of the administration of justice and which endanger, in the least, the absolute, chartered, ultimate rights of the person are wholly null and void for those reasons alone, if from no other; and lastly, that when the citizen's inherent natural unalienable, absolute and ultimate rights are threatened or endangered he can take his stand upon those rights as a strong fortress and demand of all comers to dispossess him, their right and authority so to do; that it is for the attacking party to show their possession of authority, and not for the defendant to show their want of it—that the agent should show the authority by which he acts, and not merely claim that his principal did not deny him the power.

The legislature is but the servant of the people and is directed by the constitution to *do*, for the "full, equal protection and benefit" of the people, that as American Citizens, they may have "*the full enjoyment of their rights*" as individuals; for as individuals only, can they enjoy their "*equal, unalienable rights.*" That servant is to provide for the redress of all injuries to "*person, reputation, or property*" by establishing the "*administration of justice,*" (not injustice) without delay; to cherish and protect, not to mar and destroy.

The body suffers but through its members; an injury to a member is an injury to the body. So as to the state and the citizen of the state. Therefore, when a citizen protests against an injury committed or threatened, it is the complaint of the whole state, voiced by the citizen.

Provisions of written constitutions themselves, either state or national, might be void, if, by accident, lack of wisdom or of knowledge of constitutional law, they have been inserted to the detriment of the natural, inalienable absolute, inherent rights of the people of the state or nation and in contradiction and violation of other plain provisions of the same constitution.

For which of the antagonistic provisions in that constitution shall the courts condemn; the parts which secure the rights of the people and the

administration of justice, or those which violate those rights and administer injustice?

Constitutions—meaning by the word constitution, the fundamental basic, omnipresent law of the land,—written or unwritten, constitutions—in this government, state and national, are, like the English Constitution, partly written and partly unwritten; "unwritten", as mentioned by Judge Crosiur in our quotation from his opinion—; the written parts being those set down and expressed in those instruments and the unwritten parts being those which have force and vitality from our history and traditions, the spirit and genius of our peculiar republican form of government, the universal belief, hope and trust of our citizens and the object, spirit and necessary meaning of our written constitutions expressed in their preambles and provisions.

No man may legally commit suicide of the body, nor can he authorize another, by contract or otherwise, unlawfully to take his life. Neither can any constitutional convention, or people by their ballots, give or barter away their absolute, inalienable rights, or the like rights of their posterity; nor can they authorize legislatures to abrogate these rights in case they have not had of infinite wisdom enough to protect themselves by written constitutions.

Day by day, obtaining a better understanding of fundamental laws and principles, from time to time the people declare *eternal* truth as *existing*, in regard to human rights. Witness the adoption of the 14th amendment to the National Constitution, setting forth the principle that all born on earth, not owing allegiance to a government foreign to the soil, that all such have (not *shall have*) a home as to citizenship (a fact which existed before the declaration thereof) on the spot where born; that no state in this nation shall abridge those citizens their rights and immunities, nor deprive them of due process of law; *because*, so to do would be, and had been, eternally, nothing less than radically wrong grossly unjust; and lastly, the people of this Nation having plucked "the beam out" of their own eye, and thus seeing more clearly the great beauty and *sanctity* of equal justice and equal rights to all, whether citizens of this nation or not, the people added to the 1st section of the 14th amendment its last clause—the crowning beauty of all—the gem of magnanimity—the clause, that no state shall "deny to ANY person within its jurisdiction the equal protection of the laws." Absolute, inalienable, fundamental, natural, personal rights and laws, both moral and municipal, existed in this nation before any *written* constitution either state or national was adopted.

This government is a government of *law*, "by the people, of the people and for the people," as said by the great president and statesman, Abraham Lincoln. Law is defined by Justice Blackstone as "commanding that which is right and prohibiting that which is wrong." The right and wrong part of his statement has been criticised by some, yet he wrote, perhaps, better than they knew; for the principles of right and justice are now the acknowledged *guides to the law*, which, in its great and best sense, includes equity. Bishop Hooper, also, speaking of municipal law, wrote: "Of law no less can be said than that her seat is the bosom of God, her voice the music of the spheres; all in heaven and on earth bow down and do her reverence, the poor and weak as needing her protection and the rich and strong as not beyond the reach of her power."

Such is the law; but vice, ignorance, mistake, and the fallibility of human judgment often becloud its beneficence. We appeal to this *law*, as expressed in the preamble and bill of rights of our state constitution, in the 14th amendment to the National Constitution, in opinions of our statesmen and legal scholars, and in the decisions of courts of high or last resort which we have quoted and cited in our brief.

Having now reproduced the arguments which we presented to the Supreme Court of Kansas, as to what due course of law in this nation is, and to show that in the summary conviction and judgment in the trial court appellant Lowe had not had due process of law we state that the Supreme Court of Nebraska in The State vs Ensign 11 Neb. 529 showing the same section exactly held due process of law in In re Ebenhack 17 Kan. 616 was held by the Supreme Court of Nebraska null and void and convictions by virtue of the statute not due process of law, which decision last mentioned was read in oral argument to the Supreme Court Commissioners of Kansas who heard the appeal and delivered their opinion to the three Justices of the Supreme Court, which was concurred in by all the Justices, and also shown to the Justices in our brief, read to them on our motion for rehearing, and proceed to an examination of the reasons given in said opinions by the Commissioners, and by the Justices in overruling our motion for a rehearing.

The commissioners state first: "We are met by a very serious question on the threshold of the consideration of this and that is whether this Court can review the rulings and proceedings of the Court below."

Of course that was the question that we presented and we wished a reversal of that part of the "proceedings of the Court below", by which judgment was pronounced against Lowe that he pay costs or go to jail for the reason, (and another also,) that he had not had due process of law. See Transcript of Record paragraphs 29, 30, 31 and 32 for opinion Commissioners.

We also claimed in our brief before the commisioners that in the proceedings by which Lowe had judgment rendered against him the protection of Sec. 1 Art. 14 of the Constitution of the U.S. providing that "no state shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws", was denied him for the reason that he had no protection whatever; could have no counsel, could have no challenges of jurors who were called to try the case, could call no witnesses, was not advised in any manner whatever, in the least, that any charge against him was being tried by the jury, who was sworn a true verdict to render according to the law and the evidence in The State of Kansas vs Keefer, the defendant on trial, and not sworn at all as to a verdict against Lowe; that he was mute, led like a lamb to the slaughter, should an ignorant, careless or bribed county attorney fail in his duty or a careless, interested jury, interested in the question as to who should pay the corts—themselves in part as citizens of the county, or Lowe pay the whole as prosecuting witness, or an honest jury make a sad mistake and acquit the defendant when guilty as is often done by juries, and then the door being opened by that acquittal, proceed to find the prosecuting witness guilty, or should the Judge of the trial court, through ignorance of law or by mistake grossly instruct the jury, as he did in this case. Transcript instruction marked 11 & 13 page & instruction 15 on page 9; and lastly in case the jury, disregarding as they may the mere "advice" of the Judge by his instructions, determine the words published not actionable, not a libel at all and thereupon decide that they ought to enforce sec. 326 and do enforce it by a finding against the prosecuting witness as they are told to do in that instruction 11.

That is not yet a full description, but enough description of the gauntlet, through which a prosecuting witness must run, whether guilty or not of commencing a prosecution "without probable cause and from malicious motives," as worded in that vicious sec. 326

All this was set forth to the Supreme Court Commissioners. And what

did they give as reasons for their decision after stating in the first sentence of their opinion, as we have rehearsed, that they had the case to decide, which was all that the observation could mean ?

They merely stated that a part of a verdict could not be set aside and quoted the Court's opinion in The State vs Zimmmerman, criminal libel case, 31 Kan. 85 to that effect. After verdict of acquittal of defendant, and finding against the prosecuting witness, the Court in the Zimmerman case, on motion of defendant, set aside the part of the verdict that found want of probable cause and malicious motives, because that Judge believed that part of the verdict to be against the law and the evidence, and that the prosecuting witness was innocent of the charge in the verdict. The decision of the Court in The State vs Zimmerman, 31 Kan. 85 is then quoted by the Commissioners as follows :

"In all prosecutions for libel, the jury have the right to determine, at their discretion, the law and the fact, and therefore the instructions of the court are not to bind the consciences of the jury but only to inform their judgments. Under sec. 326 of the criminal code, the jury trying the case exercised the right permitted by the statute of stating in their finding the name of the prosecutor, and that the prosecution was instituted without probable cause and from malicious motives. The court had no power to set aside the verdict in such a case, and it was equally powerless to set aside a part thereof. Therefore in the absence of such power the order of the Court was erroneous and must be reversed."

The commissioners then say in their opinion :

"Counsel for plaintiff in error criticises this decision, and very earnestly enquires 'why the trial court had no power to set aside a part of the verdict?' The reason is an obvious one ; it is because a statute of the state expressly gives the jury in such an action the right, power and discretion to determine the law and the fact for themselves. Counsel attack this provision of the statute and say it is unconstitutional and void, but he forgets that within his memory the practice in criminal cases in almost all, if not all, of the states was for the jury to pass upon the law and the facts. The force of another universal practice of courts everywhere ought to be adverted to, and that is when a jury return a verdict of not guilty in a criminal case, the trial court has no power to set it aside, or modify it in any respect. These findings against the prosecuting witness were a part of a verdict of a jury in a criminal case, wherein power by statutory enactment is given a jury to determine both the law and the facts. The trial court has no power to interfere with that verdict in any prejudicial respect, and this court is as powerless as the court below."

Yes we did criticise, justly and correctly we think, the decision of the Kansas Supreme Court in the State vs Zimmerman 31 Kan. 85 that a part of a verdict cannot be set aside as we have rehearsed on page of this brief.

The following is all that the opinion of the commissioners state as to the constitutionality of Sec. 356 Chap. 82 Gen. Stat. Kan. 1868, under the constitution of the state of Kansas, or the national constitution 14th Amendment saying nothing at all as to what was presented in argument by us against that section and no reference was made to The State vs. Ensign in Nebraska ; this is all :

"The constitutionality of the other statute" (sec. 326 in relation to findings &c against prosecuting witnesses) "has been upheld by this Court in the case of *In re Ebenhack*, 17 Kas. 618 decided many years ago." Transcript of record page .

Then it is sufficient, in answer to any argument against a decision of the Supreme Court of the state of Kansas, to say "This Court made the decision with which you find the fault." !!!

We will now consider the opinion of the Supreme Court of Kansas upon overruling our motion for a rehearing written by Chief Justice Horton, which will be found in Transcript of Record pages 29 and 30.

After stating, * * * "we need refer only to sec. 326 of the criminal code to dispose of the motion now pending", the opinion states:

"The constitutionality of this statute is upheld in *In re Ebenhack* 17 Kas. 618, decided in 1877, about fifteen years ago Mr. Justice Brewer delivered the opinion and among other things said":

Justice Horton then quotes exactly the words of the opinion of Justice Brewer giving the reasons why the section is constitutional and provides due course of law, that the prosecuting witness by filing his complaint &c "submits himself to the jurisdiction of the justice"; that "at the same time the question of the guilt of the person * * * charged with crime is tried his own conduct is inquired into"; that though "no formal accusation is presented against him" and the first accusation against him "is in the finding" (of the jury) "and order" (judgment) "but the same is equally true in many cases in commitments for contempt."

The opinion then states, after the observation that it is true that the proceeding is summary, "but it is clear that it is due process of law, and that the OFFENDER has had his day in court". And then "Indeed it may well be considered that he who maliciously or without probable cause invokes the process of a Court to oppress and wrong an innocent party * * * is guilty of a contempt of Court".

Justice Horton then says: "The present case" (Lowe's) "was decided at our January Term for 1891, in *obedience* to the Ebenhack case. That decision has established for a long time a rule opposite to the decision referred to in State vs Ensign 11 Neb. 529. We cannot now depart from the Ebenhack case without overruling various decisions and we are not willing to do so."

Then, no matter if our arguments against that vicious sec. 326 and the decision in the case of The State vs Ensign 11 Neb. 529 are never so good, right and just, and conclusive, and nothing to the contrary is said in the opinion of the Commissioners or in the opinion of Justice Horton and so we conclude the Court could find no fault with our briefs, yet, loyal to In re Ebenhack, and to "various subsequent decisions" the Ebenhack case and Lowe's case being the only cases in the Supreme Court of the state of Kansas in which the constitutionality of that vicious section 326 has been brought into question the "various subsequent decisions" being upon other points, every one of them, as right to set aside verdict in Criminal Libel cases, right to set aside part of a verdict &c, yet, if the Supreme Court of Kansas did deny justice in In re Ebenhack, did make a mistake, did erroneously say that in this vicious course of proceeding against a prosecuting witness he has due course of law, "about fifteen years ago", these errors, this denial of justice and a due course of law, has become venerable, right and a real genuine process by due course of law under the constitution of the state of Kansas and the constitution of the United States by lapse of time and "we" are "not willing" to do otherwise than we have done in the past.

"Not willing" Why? Will reversing the decision in *In re Ebenhack* unsettle any great property interests, titles to land, or what not, make anybody suffer any wrong, harm or injustice because of that reversal; be a kind of

public calamity worse than the wrong of the original decision? That has been given by our Supreme Court of Kansas in one or more cases when they were asked to reverse a decision made "many years ago", to quote from the opinion of the Commissioners, although the Court said in one such case, that if the question was then before them for the first time, they would declare the law differently. But to declare the law differently from the *In re Ebenhack* case, will harm no one. Each complaining witness has paid his cost or suffered imprisonment probably until perhaps turned out in disgust, if he could not pay; each one of them had to paddle his own canoe and has paddled it undoubtedly to some haven or other. And how much prosecuting witnesses may have suffered it is too late, of course, to help them now as they took no steps necessary to protect their rights, excepting poor Ebenhack and our client Lowe. That is took no steps to test or attempt to test the validity of that vicious sec. 326. Then, as if in answer to our description of the pitiful condition of a convicted innocent prosecuting witness Justice Horton declares

"That if sec. 326 of the Criminal Code as construed works injustice in any case, the legislature has ample authority to interfere. The decisions of this court have been uniform since *In Re Ebenhack* and we prefer to adhere to it." "Be ye fed, and be ye clothed", for uniformity is a *very* good thing in judical decisions, though a correct statement of the law is generally considered advisable.

This last quoted clause of the opinion gives the whole thing away. That a person tried and convicted of a criminal offense, the sentence a *penalty*, a *punishment* for "an unwarrantable proceeding, as Chief Justice Brewer words his opinion in *In re Ebenhack*, an innocent too must, he in jail sometimes for about two years until the biennial session of the legislature occurs, then get his senator or member of the house to introduce a bill for his relief; when the bill is referred to a committee get his attorney to take the county attorney and what not witnesses to the Capital of the state and convince the committee that this vicious sec. 326 has "worked injustice" to him, costing the innocent man more, in nearly all cases, than the amount of the judgment against him, unless it is all done for the sake of charity and pity without charge; that the innocent culprit should have to pray and ask as of grace of the legislature that justice which he had a right to demand of the court when tried, seems so unreasonable as to strongly provoke all patience. Then Justice Horton adds a final consideration stating:

"In this case it appears that the district Court approved the verdict of acquittal and also the finding of the jury against the prosecuting witness; therefore in this case the court below pronounced judgemnt of acquittal and for the commitment of the prosecuting witness in accordance with its own opinion, not merely the opinion of the jury."

Why is that said? The judgment on the verdict of the discharge of Keefer is in the usual form with no comments, and the same is true of the judgment against our client and we suppose that the Court discharged Keefer the defendant because it had to do so under the law whether he were guilty or innocent, and that the Court pronounced judgment against Lowe that he pay costs or go to jail no matter what the Court thought of his guilt or innocence, because with the decision in *in re Ebenhack*, in The State vs Zimmerman and in the "various subsequent decisions" before him that this vicious sec. 326 is constitutional, that a verdict of acquittal cannot be set aside, and that the part of the verdict against a prosecuting witness cannot be set aside in criminal libel cases nor in a larceny case, and that of course the Court felt bound by

those decisions and so have all other district courts since In re Ebenhack and The State vs Zimmerman though pronouncing judgment of punishment against a man whom they believe to be innocent, which, an opinion of the supreme court of one of the New England states declares "no Judge will do", the citation of which opinion we have mislaid and cannot give.

The last clause of the opinion by Justice Horton seems to look at the probable guilt of Lowe, as the verdict was approved by the district court, as the question or the main question before the court ; but we had not claimed that question for discussion but that the vicious sec. 326 is null and void, and could give no warrant for such proceedings against a prosecuting witness whether guilty or innocent, and if that last clause has any logic in it at all, it is to the effect that if the prosecuting witness is guilty the law is good enough however the case may be if he be innocent.

We think it a fair inference from the reference by Chief Justice Horton to the *approval* of the verdict by the trial court, and the statement that if this vicious sec. 326, chap. 82 in the Criminal Proceedure Act, (not in the Crimes and Punishment Act), "works an injustice in any case, the Legislature has ample authority to interfere", from those two clauses in the opinion, we think it a fair inference that the writer remained yet in doubt of the validity of the decision and opinion in *In re Ebenhack* and casts about for something else to say, and, finding nothing else mentions the probable guilt of Lowe as shown by the so called approval of the verdict by the trial court and then adds what the legislature may do for his relief, when all the time the power of pardon is lodged by the constitution of the state in the governor and not in the legislature, unless the legislature of a state has omnipotent power, save when expressly limited by the written constitution, which last hypothesis is a fallacy as we have shown. And no matter if the legislature can relieve, for—the question still remains, did appellant have, in his trial and judgment, due process of law and the equal protection of the laws, under the 14th Amendment to the Constitution of the United States?

We also claim that appellant did not have due process of law and the equal protection of the laws, for the reason that Sec. 275 Chap. 31 General Statutes Kansas, Crimes and Punishments, concerning the trial of criminal libel cases, under which Keefer as defendant and Lowe as prosecuting witness, were tried, and appellant Lowe convicted of a *criminal offense*, as we have heretofore shown by the statute of Kansas, and the decision in *In re Ebenhack*, we claim that that section 275, is also a vicious law and null and void as violating the constitution of the state of Kansas, and the constitution of the United States, 14th amendment and providing for the denying due course of law to the defendant, and also to the prosecuting witness whose conviction or non conviction depends solely upon the trial of the defendant in the libel case.

We wish to say first as to this proposition, that many of our observations in relation to Sec. 326, Chap. 83, proceedure criminal, are applicable to the section now under consideration, and that we need not repeat them.

It must be borne in mind that the provisions of section 275 in relation to indictments or prosecutions for libel lacks express constitutional sanction, and therefore its validity depends entirely upon the powers of the legislature to enact the law, without the incorporation of the provision in the constitution, as has been done in some of the States. If such a provision had been placed in our constitution, as a matter of course, there could be no constitutional objection to the law, unless the written constitution is not all of state and national constitutions as we have heretofore shown to be the fact.

This section provides that: "In all indictments or prosecutions for libel, the jury, after having received the direction of the Court, shall have the right to determine, in their discretion, the law and the fact", and this Court, in the cases of The State vs Zimmerman, 31 Kan. 86, and The State vs Verry, 36 Kan. 416, has decided, in substance, that in such cases the instructions of the Court are not to bind the consciences of the jury, but only to inform their judgments; that in the trial of an offense other than libel, the jury are the exclusive judges of the facts, but not so with the questions of law which are involved, that as to those questions of law that properly arise in other cases than libel, it is the duty of the Court to instruct the jury, and it is incumbent upon the jury to apply the law so given to the facts of the case and conform their verdict and decision to the instructions; that in cases of libel the jury are at liberty to decide the law in accordance with or contrary to the opinion of the Court; that the Court should instruct the jury as fully and completely as in cases where the jury are to implicitly take and follow the law laid down by the Court, but the instructions which the Court gives are only advisory, and the jury *are not in duty bound to accept and follow the views of the Court.*

This section is very general in one respect and the statements of this Court as to the rights and privileges of the jury under its provisions are as general as the law itself, and are undoubtedly the necessary meaning and construction of the law, as it reads, for there would be no sense in the enactment of such a provision if the court could set aside the verdict, as in all other cases, if the verdict should be contrary to law, and convicted the defendant.

The question arises in our minds as to what law the jury have the right to determine in their discretion; the law of, or pertaining to libel alone, or have they right to determine in their discretion all the law upon which they are advised by the Court? The section states generally that the jury shall have the right, in their discretion, to determine the law and if the legislature can empower the jury to determine a part of the law in such cases it certainly can empower them in like manner to determine in their discretion the whole of the law upon which the Court has advised them. The section makes no reservation, no distinction, places no limitation upon the right of the jury to determine "the law" in their discretion and this Court in its explanation of the matter, in the two cases cited above, states the right of the jury as generally as does the act of the legislature itself.

We think, in the absence of any light upon the subject, that the legislature gave the jury full sweep in cases of libel so far as law is concerned, and in this case the trial judge evidently entertained the same view. (See his remarks to the jury upon the occasion of the suppressed and admitted depositions, transcript of Record his instructions to the jury, paragraph 8 page 7, par. 11 page 8, par. 13, same page 8, par. 15 page 9 of Transcript of Record, and the Court's address to the jury, par. 4 page 17 of transcript of Record, upon occasion of reading to the jury exhibits.)

But it can make but little difference, for in principle it is the same, whether they would be the judges of the law of libel alone, in their discretion, or of the admissibility of testimony, the matter of the defendant's being considered innocent until proven guilty beyond a reasonable doubt, and what not else.

We are in this part of the case presented with the same spectacle of the Court deprived of a part, another part, of its judicial powers by an act of the legislature, the power to declare the law with authority, or to even decide what the law is as applicable to the trial of the case; for the Court can only advise as to the law—express an opinion merely on that subject, and the jury is cloth-

ed with the power to *decide the law and enforce it also.*

The legislature sinks the judge and exalts the jury to *his* place in judicial authority, bestows the judicial powers, protanto, upon the jury when the constitution has vested it in the courts. For the jury is not a court, cannot be such, else we have two courts in one,—or rather a double-barreled court, one part firing away, as in other cases, at what it considers the mark, and the other shooting at discretion and liable to bo mischief beyond repair.

And to what a pitiable condition does this act of the legislature reduce the law. The jury may disregard the ADVICE of the Court—his statement of the law is no instruction or charge to the jury—and, taking the argument or advice of some pettifogger, decide the case directly in opposition to the advice of the Court.

Who can know the law in libel cases tried under the provisions of this section, when each case is a law unto itself? What law tends to protect the accused if innocent, and what law tends to his conviction if guilty? The law cannot be known or predicted in either case, because it is enshrouded in the discretion of the jury and mantled by whatever ignorance, stupidity or caprice they may possess; and yet the whole thing it its entirety, is to be called "due process of law."

Also why, if the legislature may provide for the determination of the law by the jury, in their discretion, in libel cases, why it may not do the same in larceny, murder, or in fact in all criminal cases, or at least, in all cases of misdemeanor, thus further emasculating the Court?

This section changes the ordinary rule that the Court or the judge of the Court shall charge and instruct the jury as to the law of the case authoritatively—as a command, and takes away his power to do so, a judicial power which he has in every other case where a jury passes upon the facts instead of the Court; forbids that which is a judicial duty incumbent upon him in all other cases, and invests the jury with the power and authority to exercise the judicial functions of a Court, for the time being—for the case being tried.

Judge Crozier held in the Habeas Corpus case of Ryan, Buttinger and Armstrong, and with good and valid reasons, as it appears to us that when a county attorney or assistant attorney general, under the prohibition laws of this state, sentences a contumacious witness to imprisonment for refusal as a witness to answer questions, he exercises judicial powers; that the proceedings is a judicial proceedings; that any tribunal exercising judicial functions is to that extent, and for the time being, a court, whether denominated such or not.

Now in the case of a jury trying a case of libel under that section 275, the jury certainly acts as a court; the chief part too—as the other piece of the Court appears to be infinitely small, and, for the time being, not worth $2,500 per year. We think that it must be concluded that the jury, in such case is the whole Court, for the judge, so called, is given no show at all as to either the law or the facts. If we are right in our hypothesis then we have here another court especially organized—ordained—by the legislature by means of section 275, to hear, try and determine one single class of criminal cases up to verdict, with sheriff, clerk, and a new kind of officer, called a legal advisor, as helpers or ministerial officers. Upon the rendering of the verdict this new Court disappears as suddenly as it disclosed itself to view—dissolves, as a Court, into thin air, is forever gone, and the judge as a Court becomes alive again.

This proceeding is unconstitutional in several respects: 1st. It takes away the judicial power from the Court, where it is placed by the common law, and bestows it upon the jury; juries being with the sheriff and clerk the assistants

—the equipments of the Court for the administration of justice.

2nd. It deprives the defendant of the protection of the law of the land, or it may do so if the judge of the court truly states the law in his so called advice to the jury. Whenever the jury, in their discretion, determine the law as different from, or contrary to, the law as stated by the Court, then he may be declared guilty when otherwise he might be declared innocent.

For he is to be judged by both the law and the evidence. Will any one say that the law cuts no figure in the case? That it is the evidence that proves him guilty? Yes, but under the law and according to the law only.

3rd. Under the provisions of this section, the jury may in their discretion so determine the law that a citizen may be declared guilty of a crime when by the law of the land, he is innocent, or, under this section there is no law of the land, save by or through the discretion of a jury in each case.

4th. If there is no law of the land in libel cases save that law determined by the discretion of the jury, then this section is unconstitutional as having abrogated the law, by making it unknown and unknowable save by the experiment of getting tried for libel; and the law of libel in that case, unfortunately may not be the law in the next, even if one exactly the same and tried by the same jury, for their discretion may not guide them in the same conclusion upon further light or argument of counsel on the subject.

5th. There is a law in respect to criminal libel; for the Court is to advise the jury as fully in regard to the law as in other cases, and therefore the law permits the jury in their discretion to disregard and violate the law.

6th. Because the section is irrational, erratic, tyranical, arbitrary, whimsical, and contrary to common sense, and therefore is not an exercise of legislative power.

7th. Because in substance and character it does not comport with a single definition or explanation of the phrase "due process of law" being "according to those rules and forms which have been established for the protection of private rights." Mr. Justice Edwards.

It is an exercise of the power of the legislature, "unrestrained by the established principles of private rights and distributive justice." Mr. Justice Johnson.

It is not such an exercise of the power of the legislature "as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribed for the class of cases to which the one in question belongs." Judge Cooley.

It is in "violation of a due course of legal proceedings according to those settled maxims, rules and forms established for the protection of private rights against the arbitrary exercise of power unrestrained by established principles applicable to such rights or to the administration of justice." Justice Foster.

All these extracts we have duly cited as authorities in a former part of this brief.

8th. Because the section does not give the defendant the "equal protection" and "benefit" of the laws which others tried for offenses have in the same Court.

9th. This section, according to its purport, empowers the jury in effect, either to alter or amend the existing law, or to *enact* the law—decide upon a "*rule of action*" in their discretion, either of which is a legislative act; and hence the legislature attempts thereby to confer *both* legislative and judicial power upon the jury.

But the defendant Keifer was acquitted by the jury, discharged without day by the Court, was not in the least prejudiced by the course of proceedure during the trial and is not here complaining that his trial was not in "due process of law", and hence it yet remains for us to show that appellant was, or *may have been* prejudiced as to his substantial rights by the form and manner of the trial of the original or main case, so that the judgment against him was not rendered after due process of law--that he did not have the equal protection of the laws.

Here we wish to state, as the foundation of this branch of our argument, that the liability of the appellant depended upon two separate findings of the jury, to-wit:

1st. That the defendant Keifer was not guilty as charged and

2nd. That the prosecution was without probable cause and also from malicious motives—

It necessarily follows that the former finding was a condition precedent to the latter; that the latter finding would have been of no legal force or effect without the former; and therefore appellant has the right to complain of each and every error in law made by the Court, which in any way may have been substantially in favor of the defendant and thus may have tended to his acquittal; that appellant has the same right to complain of any error in *favor* of defendant, as the defendant Keifer would have had to complain of error in law *against* himself if he had been convicted.

The liability of appellant was partially, though not solely, dependent upon a verdict of acquittal of Keifer and the law which may have been determined by the jury in their discretion, may have been such that it not only tended to direct or cause the acquittal of Keifer, but also the finding of want of probable cause for the prosecution. Who will say that could not have been the fact?

It matters not that we may not show an error of law which may have tended to affect the part of the verdict relating to malicious motives, for we are not bound to show that everything in that trial, against Lowe, may have been because of error in law; and we will take the liberty of saying in this connection that, in our opinion, the average juror is ready enough to see some evidence of malice against a prosecuting witness, when he has already found the prosecution instituted without probable cause--to conclude that want of probable cause is, in fact, strong evidence of malicious motives, especially when the county is in danger of having to pay large costs unless the prosecuting witness is made to pay them himself.

Yet who can say that the general statement that the jury "shall have the right to determine, in their discretion, the law," does not give the jury the right to so determine the law in relation to the prosecuting witness as well as in relation to defendant? If it is objected that such construction of the law is not reasonable; that it is not just to the legislature to suppose that it intended such an effect, we will state that it is hard to say what foolishness may not have been intended by the enactment of such an unreasonable law, and decline to decide upon that point.

But this we do affirm, that no one can say that the jury may not have been led, or misled, to think and believe that they had such right by that section of the statute.

The section of the statute referred to, if acted upon by the jury—if the jury determined the law in their discretion, in place of accepting the learned advice of the Court, then such determination of the law may have affected the

question of the guilt of Keifer —may have tended to the conclusion of his innocence and if the determination had been different, then it might have tended to his conviction and in case he had been found guilty he then would have had a remedy, if this law is not the law of the land.

But the verdict was in his favor and could not be set aside, not because the jury were the judge, in their discretion, of the law, but for the single and sufficient reason, that having been once tried and acquitted he, by the law, could not be the second time put into jeopardy, no matter what errors of law against his rights had intervened, that being the law in all criminal cases, whether it be a case of trial for libel or for any other offense.

If appellant had any hearing at all before that jury ; if he was tried at all for the "offense" of which the jury, by their verdict, found him guilty, and for the commission of which the Court pronounced "sentence," then such hearing and trial was a mere incident to the trial of Keifer—a mere collateral inquiry ; mixed up in all its parts from the very necessity of the conditions under which such a trial or hearing was accorded unto Lowe, with the trial of another person for another and different offense ; such other and different offense having no connection whatever with, and bearing no similitude to, the supposed offense of Keifer. And now by what rule of law, by what rule of practice in the Courts, for what reason was he so tried and adjudged guilty, save that the legislature had so directed in libel cases as well as in others—so decreed by section 326 and said section 275 ?

Section 275 in relation to the trial of libel is unconstitutional as regards the appellant, because it subjected whatever trial or hearing he had, to rules and a course of proceedings not the usual regular and general ones in the administration of justice in this state in criminal cases, and because it is a mere arbitrary fiat as regards both the defendant in the main case and the prosecuting witness.

This case is an eminent example of the great danger of venturing the rights of citizens upon the broad sea of novelty and uncertainty in the administration of justice, by adopting for the punishment of but one offense of those known to the criminal jurisprudence of our state, a most swift and summary course of proceeding *to arraignment, verdict and judgement*, without the least moment of time, from the beginning to the end of the proceeding, during which the supposed offender may do the least to avert his approaching doom. "In all judicial proceedings, notice to parties and an opportunity to defend are essential." Cooley's Con. Lim. 130, citing McDonald vs Correll, 19, Ill. 226.

The law and the decisions of this Court seem to say that he has committed such an offense, or may have committed such an offense, that the verdict of the jury against him—*a verdict of a jury*!!—imports an absolute verity; that his offense, or the offense of which he may have been guilty is of that peculiar character and if really committed of such peculiar atrocity, that the verdict is, like the decree of the Almighty, not even to be questioned; that the trial Court has "no power in such case" to set it aside for any reason, and that the prosecuting witness is to be, like a lamb, led to slaughter.

While all others accused of offense, whether guilty or innocent, from the petty offender whose wrong doing is so slight that he must be prosecuted within 30 days, after the date of his offense and who cannot be punished by fine exceeding twenty-five dollars—one who is found on the streets a little too tight, for instance—Laws of Kansas 1883, ch. 104 sec. 2—from such petty offender to him who is guilty of murder or treason inclusive, all must and do have their rights and chances for escape so well, so thoroughly and particularly secured

unto them that it is hard to convict one plainly guilty by the evidence in the case and make that conviction stand, even after judgment.

We see convicts traveling to and fro, from the penitentiary back to the trial court, and from the trial court back again to the penitentiary, more tired, perhaps in some cases, than was Childe Harold on his "weary pilgrimage" as related by Byron; until like Burns, when contemplating Old Nick in his place of torment, we are constrained to pity the poor devil and finally, perhaps, let him go.

All offenders tried by a jury, excepting a prosecuting witness have their rights and chances; his case seems unique, an anomaly, a paradox in the administration of justice, for he seems, like Dred Scott, to have no rights of defense or for relief which anyone is bound to respect or protect; in fact even if innocent in the opinion of the trial court the judgment of that court setting aside the verdict against him will be reversed by this court. See The State vs Zimmerman, 31 Kas. 85.

We observe here that many of the considerations which we have offered in relation to the constitutionality of section 275, Crimes and Punishments, in relation to trials of libel cases, are also pertinent to the constitutionality of section 326, Proceedure Criminal, and that it is very difficult sometimes to consider the one section without mention of the character, import and effect of the other.

We now wish to offer for the consideration of this Court certain opinions, decisions and arguments concerning the relative power, authority dignity and reverend character of acts of the legislature and our courts of last resort.

There seems to be, to us, a strange and unreasonable feeling of respect, amounting almost to awe, for the power, dignity, learning and integrity of legislatures prevalent among some of our courts of last resort, to judge from their solemn declarations in that respect.

We wish to quote, as relating to this subject, from Cooley's Constitutional Limitations, in which learned work the eminent author and jurist has stated the subject quite fully and authoritatively, citing many decisions of courts and opinions of learned writers, to the following effect:

1. "In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by the soverign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the constitution of the United States." Page 106.

2. "It has never been questioned, so far as I know', says Redfield, Ch. J., 'that the American legislatures have the same unlimited power in regard to legislation which resided in the British Parliament, except where they are restrained by written constitutions.'" Page 108.

3. "The rule of law upon this subject appears to be that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, *whether it operates according to natural justice or not*, in any particular case. The Courts *are not* the guardians of the rights of the people of the state except as those rights are secured by some constitutional provision which comes within the judicial cognizance." (2) Page 204.

4. "If the courts are not at liberty to declare statutes void because of their apparent injustice or impolicy, *neither can they do so because they appear to the minds of the judges to violate fundamental principles of republican government*, unless it shall be found that those principles are placed beyond

legislative encroachment by the constitution." Page 205. (?)

5. "Nor are the courts at liberty to declare an act void, because in their opinion it is opposed to a *spirit* supposed to pervade the constitution but not expressed in words. (?) When the fundamental law has not limited, either in term or by necessary implication, the general powers conferred upon the legislature, we cannot declare a limitation under the notion of having discovered something in the *spirit* of the constitution which is not even mentioned in the instrument. 'It is difficult,' says Senator Verplanck, 'upon any general principles, to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the *express words* of a written constitution give that authority.' (?) There are indeed many dicta and some great authorities holding that acts contrary to the first principles of right are void." Page 208.

6. "It is a solemn act in any case to declare that that body of men to whom the people have committed the sovereign function of making the laws for the commonwealth, have deliberately disregarded the limitations imposed upon this delegated authority, and usurped power which the people have been careful to withhold; and it is almost equally so when the act which is adjudged to be unconstitutional appears to be *chargeable rather to careless and improvident action, or error in judgment*, than to intentional disregard of obligation." Page 195.

The last quotation with others familiar no doubt to the Court suggests great caution to the Court in regard to the fearful thing of holding an act of the legislature void, but we are able to present to the Court other authorities than those above quoted, which seem in direct conflict with the general spirit and import of all the above in support of the unlimited and inherent power of the legislature in making laws when not limited by *written* constitutions.

We quote from Kent's Commentaries, Vol. 1:

1. "As the judicial power is entrusted with the administration of justice, it interferes more visibly and uniformly than any other part of government, with all the interesting concerns of social life. Personal security and private property rest *entirely* upon the wisdom, the stability, and the integrity of the courts of justice." Page 291.

2. "Nor an independent judiciary less useful as a check upon the legislative power, which is some times disposed, from the force of party, or the temptations of interest, to make a sacrifice of constitutional rights; and it is a wise and *necessary* principle of our government, as will be shown hereafter in the course of these lectures that legislative acts are subject to the severe scrutiny and impartial interpretation of the courts of justice, who are bound to regard the constitution as the paramount law, and the highest evidence of the will of the people." Page 294, 295.

3 "The judicial power in every government must be coextensive with the power of legislation." Page 296.

"We cannot but admire the intrepidity and powerful sense of justice which led Lord Coke, when chief justice of the K. B. to declare as he did in Dr. Bonham's case, that the common law, doth control acts of parliament, and adjudges them void, when against common right and reason." Page 449.

4 "The Constitution is the act of the people, speaking in their original character and defining the permanent conditions of the social alliance; and there can be no doubt on the point with us, that every act of the legislative power, contrary to the *true intent and meaning* of the constitution, is absolutely null and void." Page 450.

5. "From the mass of powers necessarily invested in the legislature, and the active and sovereign nature of those powers; from the numerous parties of which the legislature is composed, the popular sympathies which it excites, and its immediate dependence upon the people by the means of frequent periodical elections, it follows that the legislative department of the government will have a decided superiority of influence. It is constantly acting upon all the great interests in society, and agitating its hopes and fears. It is liable to be *constantly swayed* by popular prejudice and passion, and it is difficult to keep it from pressing with injurious weight upon the constitutional rights and privileges of the other departments. An independent judiciary venerable by its gravity, its dignity, and its wisdom, and deliberating with entire serenity and moderation, *is peculiarly* fitted for the exalted duty of expounding the constitution, and trying the validity of statutes by that standard. It is only by the *free exercise* of this power that courts of justice are enabled to repel assaults, and to protect every part of the government, *and every member of the community*, from undue and destructive innovations upon their *chartered rights*." Page 450.

6. "In 1792, the supreme court of South Carolina, in the case of Bowman vs Middleton, went further, and set aside an act of the Colony legislature, as being against common rights and the principles of Magna Charta, for it took away the freehold of one man and vested it in another, without any compensation, or any previous attempt to determine the right. They declared the act to be *ipso facto* void, and that no length of time could give validity. *This was not* strictly a question arising upon any special provision of the state constitution; but the court proceeded upon those great fundamental principles which support all government and property, and which have been supposed by many judges in England to be sufficient to check and control the regulations of an act of Parliament." Page 452.

We next quote from Cooley's Con. Lim. and authorities therein cited:

7. "In considering State constitutions we must not commit the mistake of supposing that, because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they *do not* measure the rights of the governed. What is a constitution, and what are its objects? It is easier to tell what it is not than what it is. It is not the beginning of a community, nor the origin of private rights; it is not the cause, but consequence, of personal and political freedom; it *grants no rights to the people*, but is the creature of their power, the instrument of their convenience. *Designed for their protection* in the enjoyment of the rights and powers which they possessed before the constitution was made, it is but the framework of the political government, and *necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought.* There is nothing primitive: It is derived from a known source. It presupposes an organized society, law, order, property, and personal freedom, a love of political liberty, and enough of cultivated intelligence to know how to guard it against the encroachments of tyranny. A written constitution is in every instance a limitation upon the powers of government in the hands of *agents*; *for there never was a written Republican constitution which delegated to functionaries all the latent powers which lie dormant in every nation, and are boundless in extent, and incapable of definition;*" Page 47, Hamilton vs St Louis County Court, 15 Mo. 13. Written constitutions sanctify and confirm great principles, but the latter are prior in existence to the former. 2 Vol. Webster's works, 392

"If this charter of state government which we call a constitution were all there was of constitutional command; if the usages, the customs, the maxims, that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interest; the precepts that have come to us from the revolutions which overturned tyrannies; the sentiments of manly independence and self control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so,—if a recognition of all these were to be stricken from the body of our constitutional law a *lifeless skeleton* might remain, but the living spirit, that which gives it force and attraction, which makes it valuable, and draws to it the affections of the people; that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down within the last hundred years, many of which in their expressions, seemed equally fair and to possess equal promise with ours, and have only been wanting in the support and validity which these alone can give,—*this living and breathing spirit* which supplies the interpretation of the word of the written charter would be utterly lost and gone." People vs Hurlburt, 24 Mich. 44-107.

8. "It is idle to say that the authority of each branch of the government is defined and limited by the constitution, if there be not an *independent power able and willing* to enforce the limitations. Experience proves that the constitution is *thoughtlessly but habitually* violated; and the *sacrifice* of the *individual rights* is too remotely connected with the object and contests of the masses to attract their attention. From its very position it is apparent that the conservative power is lodged in the judiciary, which, in the exercise of its undoubted rights, is *bound to meet* any emergency; else causes would be decided, not only by the legislature, but sometimes without hearing or evidence." Per Gibson, Ch. J., in DeChastellux vs Fairchild, 15 Penn. St. 18.

9. "It cannot be denied that one great object of written constitutions, is to keep the departments of government as distinct as possible; and for this purpose to impose restraints designed to have that effect. And it is equally true that there is no department on which it is more necessary to impose restraints than upon the legislature. The tendency of things is almost always to augment the power of that department in its relation to the judiciary. The judiciary is comqosed of few persons, and those not such as mix habitually in the pursuits and objects which most engage public men. They are not, or never should be, political men. They have often unpleasant duties to perform, and their conduct is often liable to be canvassed and censured where their reasons for it are not known or cannot be understood. The legislature holds the public purse. It fixes the compensation of all other departments; it applies, as well as raises all revenues. It is a numerous body, and necessarily carries along with it a great force of public opinion. Its members are public men, in constant contact with one another and with their constituents. It would seem to be plain enough that, without constitutional provision which should be fixed and certain, such a department, in case of excitement, would be able to encroach on the judiciary. The constitution being the supreme law, it follows, of course, that every act of the legislature contrary to that law must be void but who shall decide this question? Shall the legislature itself decide it? If so, then the constitution ceases to be a legal, and becomes only a moral restraint upon the legislature. If they, and they only, are to judge whether their acts be conformable to the constitution, then the constitution is admonitory or advisory only, not legally binding; because if the construction of it

rests wholly with them, their discretion, in particular cases, may be in favor of very erroneous and dangerous construction. Hence the courts of law necessarily, when the case arises, *must* decide upon the validity of particular acts." Webster's works, vol. 3. Page 29.

10. "When, in the exercise of proper legislative powers, general laws are enacted which bear, or may bear, on the whole community, if they are *unjust and against the spirit of the constitution*, the whole community will be interested to procure their appeal by voice potential. And this is the great security for just and fair legislation. But when individuals are selected from the mass, and laws are enacted affecting their property, without summons or notice, *at the instigation of an interested party*, who is to stand up for them, thus isolated from the mass, in injury and in justice or where are they to seek relief from such acts of despotic power? They have no refuge but in the courts, the only secure place for determining conflicting rights by *due course of law*. But if the judiciary give way, and, in the language of the Chief Justice in Greenough vs Greenough, in 11 Penn. St. 494 confesses itself too weak to stand against the antagonism of the legislature and the bar, one independent coordinate branch of the government will become the subservient hand maid of the other, and a quiet, insidious revolution will be effected in the administration of the government, while *its form on paper remains the same*." Ervine's Appeal, 16 Penn. St. 268.

11. "It is now considered a *universal and fundamental proposition* in every well regulated and properly administered government *whether embodied in the constitutional form or not*, that private property cannot be taken for a strictly private purpose at all, nor for the public without a just compensation; and that the obligation of contract cannot be abrogated or essentially impaired. These and *other vested rights* of the citizen *are held sacred* and *inviolable*, even against the *plenitude of power* in the legislative department." Nelson J., in People vs Morriss, 13 Wend. 328; Bank of Michigan vs Williams, 5 Wend. 486. Page 212, Note.

12. "Everyone has a right to demand that he be governed by general rules; and a *special statute* which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws are to be governed by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and countryman at plow.' This is a maxim in constitutional law, *and by it we may test* the authority and binding force of legislative ecactments." Page 491. Locke on civil government. Sec. 142; State vs Duffy, 7 Nev. 349.

13. "The doubt might also arise whether a regulation made for one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities, in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must *rest upon some reason* upon which they can be defended—like the want of capacity in infants and insane persons." Page 492.

14. "To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted by the community at large, would be to deprive them of *liberty* in particulars of primary importance to their pursuit of happiness; and those who should claim a right to do so ought to be able to show a *specific* authority therefor, *instead of call-*

ing upon others to show how and where the authority is negatived." Page 492 —493. (The italics are our own.)

To the last class of authorities above quoted we venture to add length by quoting from the learned and forcible dissenting opinion of Justice Brewer in The State ex rel vs Nemaha County, 7 Kas. 542.

After stating that power is not inherent in the government; that the object of the constitution is to grant not withold power, that being the primal distinction between the monarchical governments of Europe and ours; that though the legislature is not limited by the terms of the constitution to legislate upon named and specific matters only, yet it is nevertheless acting by virtue of granted power. He states:

15. "The habit of regarding the legislature as inherently omnipotent, and looking to see what expressed restrictions the constitution has placed upon its action, *is dangerous, and tends to error.* Rather regarding first, those essential truths, those axioms of civil and political liberty upon which all free governments are founded, and secondly, those statements of principles in the Bill of Rights upon which this governmental structure is reared, we may properly then inquire what powers the words of the constitution, the terms of the grant, convey. It is true, many of the provisions of the Bill of Rights are so limited in their scope, so certain, so clear, and well defined, that their full force is easily understood and applied without difficulty, whether we consider them as restrictions upon inherent, or conditions of granted, power. Such is section 16: No person shall be imprisoned for debt except in case of fraud. The full extent of this provision is tangible, definable. It reaches to a single ill. Full effect can be given to it without difficulty. But there are provisions which are not so limited, certain and definite. Such are section 1: 'All men are possessed of equal and unalienable natural rights, among which are life, liberty and happiness;' and the first sentence of section 2: 'All political power is inherent in the people, and all free governments are founded upon their authority, and are instituted *for their equal protection and benefit.*' Looking upon these simply as limitations upon existing power, as restrictions upon an otherwise absolute supremacy in the legislature, and they seem little more than 'glittering generalities'. But when we regard them as the conditions upon which legislative power is granted—as the foundation principles upon which all legislative actions must be based, and a disregard of which *renders such action void*, they become substantial, prominent, vital. The very first condition of legislative action is, that such action shall be for the *equal benefit and protection* of the people. Impartiality must be the unvarying rule. True, it is not possible that all legislation should, in its results, operate equally upon all classes and industries." * * * * * "I cannot do better than to quote the forcible language of Mr. Justice Ranney, in his dissenting opinion in Cass vs Dillon, 2 Ohio St. 628: 'First among them in order, and first also in importance, is the great political truth that sovereignty belongs only to the mass of the community; or as expressed in the Bill of Rights, 'all political power is inherent in the people.' In extended communities, for obious reasons, the direct exercise of this power becomes impracticable, and this led to an institution of a subordinate agency for the government entrusted for the time being with the exercise of such sovereign power, and such only, as is clearly expressed in the instrument of delegation—the constitution. This seems very plain, almost too plain, to need this formal statement; and yet is forgotten or disregarded, as often as the argument is advanced, that a legislative act can only be treated as inoperative when expressly prohibited by some clause or

section of the constitution. The question can never be, What might the people, the source of sovereign power, have done or authorized to be done in their name and behalf? But, *but what have they authorized to be done?*

16. "As well might any other agent acting under written instructions claim to be authorized by his principal to do whatever he was not expressly prohibited from doing, however foreign it might be to the power actually conferred. Hence this court has held that it is always legitimate to insist that a legislative enactment, drawn in question, is invalid, either *because it does not fall within the general grant of power* to that body, or because it is prohibited by some provision of the constitution; and if the former is made to appear it is as clearly void as though expressly prohibited." 1 Ohio St. 86.

The first group of opinions numbered from one to six and the latter numbered from one to fifteen seem clearly to advocate quite different and very conflicting ideas concerning limitations of the legislative power of the states of the Union; the former tending to establish as the law, that a state has legislative power to any extent and for any purpose, good, bad or indifferent, save and except as limited by the terms, of written constitutions, that aside from prohibition set down in written constitutions—either that of a state or that of the Nation—a state legislature is *not* lacking of the power to enact any law which may seem fit, *because*, it is not, "so nominated in the bond"; that, save as so limited, legislatures have the same power as the sovereign authority in *any* country (1); the same as the British Parliament; that it is practically absolute, whether it operate according to natural justice or not in any particular case, (3) even if that power is exercised in violation of the fundamental principles of Republican government (4); that a spirit of the constitution not expressed in words, is no limitation of legislative power (5); that its omipotent power cannot be limited by judicial interposition, though there are *dicta* and some great authorities holding that acts *contrary to the first principles of right* are void (5); that it is almost as bad to charge a legislature with improvidence or error, as to accuse it of downright usurpation and rascallity (6); and that courts *are not the guardians of the rights of the people of the State*, except as those rights are protected by the constitution of the state or of the United States (3); and the people as to such unprotected rights, are in a worse condition than are those orphans, of whom the Court can take no knowledge or care.

The foregoing is a monarchical idea or government and of the governed and we are happy that we have another one presented to us in the other opinions which we have presented for the consideration of this Court, in a former part of this brief; pages 27 & 28

The consideration of these conflicting ideas of legislative power suggests to us a new parable as illustrative of the whole controversy:

"A certain lord said unto his servant; 'Go, work in my vineyard,' and straightway the servant arose and departed unto the vineyard. And some of the vineyard he tilled, some he watered and some he dunged; moreover, some he bruised, some he brake and some he utterly destroyed. And it came to pass that when his lord, lifted up his eyes and beheld his vineyard he was exceedingly wroth. But the servant, willing to justify himself, said unto his lord: 'This thing, concerning the which thou art wroth, thou didst not forbid unto me.' Nevertheless, that servant was quickly cast out of the vineyard."

Before we close our brief we wish to quote the decision of Justice Field in the case of Ah Kow vs Newman 5 Sawyer's Circuit Reports 562.

Ah Kow had his queue cut off by the city marshal of San Francisco, in pur-

suance of a city ordinance so directing, and Ah Kow brought suit for damages. Justice Field in his opinion states :

"It" (the 14th Amendment) "further declares that no state shall deprive any person (dropping the distinction of citizen) of his liberty or property without due process of law, nor deny to any person the equal protection of the laws. This inhibition upon the state, applies to all the instrumentalities and agencies employed in the administration of its government, to its executive, legislative and judicial departments, and to the subordinate legislative bodies of counties and cities. And the equality of protection thus assured to every one, whilst within the United States, from whatever country he may come, or of whatever race or color he may be, implies * * * * that the courts of the country shall be open to him on the same terms as to all others * * * * for the security of his person or property, in the prevention of wrongs and the enforcement of contracts." We also ask the attention of this court to the syllabus in that case paragraphs, 5 and 6 and notes pages 562 and 563.

Our client is not a Chinaman but a free born American Citizen of the United Stares not here complaining that the hair of his head has been illegally severed but that he is shorn of his absolute, inalienable, constitutional rights, which are as much entitled to consideration and full protection as the natural covering of any man's head.

We regret very much, to have to state that we have lost our memoranda of a case decided in this court or a federal court in Maryland on application for a writ of Habeas Corpus in behalf of an imprisoned judgment debtor. Plaintiff had recovered judgment and the same remaining unpaid, he filed with the clerk of the court in which the judgment was rendered an affidavit simply, that the judgment remained unpaid. The Clerk or Court issued its capeas ad satisfaciendum and the debtor was duly arrested thereon.

The Court decided against the debtor, on the ground, that the laws of the state of Maryland by statute had provided for the proceeding against the debtor but also provided that upon arrest the prisoner might have a jury impaneled and sworn and the fact inquired into whether the judgment remained unpaid as stated in plaintiff's affidavit, and the debtor had neglected to avail himself of that right of trial by jury, and therefore had no legal cause to complain of the continued deprivation of his liberty.

The Court then stated that had petitioner no such right and opportunity by law to trial by jury, or if having such right and opportunity he was situated under such adverse circumstances that he could not avail himself of that mode of proceeding then, in that case, the court would hesitate long, before refusing him relief.

We claim that we have shown :

1st. That "There are certain fundamental principles of right and justice inherent in the nature and spirit of the social compact designed to protect the life, liberty and property of the citizen from the unjust exercise of legislative powers, which *rises above and restrains* the power and authority of the legislature." Baltimore vs State 15th Md. 379.

2nd. That the proceeding against Lowe was for an offence, a criminal offense, is shown by the terms of Sec. 2 Chap. 82 Proceedure Criminal statutes of Kansas, which reads as follows :

"Sec. 2. A public offense within the meaning of this or any other statute is an act or omission for which the laws of this state prescribe a punishment ; and by the decision and opinion of the Supreme Court of the state of Kansas, in *In re Ebenhack*, 17 Kas 618 in which Chief Justice Brewer decides that the

prosecuting witness is to pay the costs as a penalty, a punishment for his unwarrantable proceeding."

3rd. That Lowe might have been proceeded against in the common mode by indictment as provided by sec. 307, Chap. 31 Crimes and Punishments, which reads as follows: "Whenever any fine penalty or forfeiture is or may be inflicted by any statute of this state *for any offense*, the same may be recovered by indictment, * * *;" by another statute information may, in all cases be used in place of indictments.

4th. That this sec. 326 provides for an arbitrary summary mode of proceeding to punish an offense which is unconstitutional, null and void, as not due course of law.

5th. That the other vicious section 275, Crimes and Punishments, providing that in libel cases, the jury shall be the judges of the law as well as of the facts is unconstitutional null and void as providing a mode of proceeding that is not due course of law, as has been already adjudged by the supreme courts of several of the states, and that such course of proceeding might have injuriously affected the prosecuting witness Lowe.

6th. That legislatures cannot delegate judical or legislative power to a jury, nor emasculate the court of its common law prerogative nor prevent the due discharge of duty according to the common law, by the Court: that "The true distinction is between the delegation (of the power) to make the law which involves a *discretion as to what the law shall be*, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first *cannot be done*; to the latter no valid objection can be made. Sutherland on Statutory Construction, page 626 Sec. 480.

7th. That the judgment of the Supreme Court of the state of Kansas in this case should be reversed and remanded, with judgment in this court in favor of appellant for his costs in this behalf expended.

GEORGE CHANDLER,
Attorney for Appellant.

THE LAW ASSOCIATION
OF
PHILADELPHIA.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

No. 174; OCTOBER TERM, 1895.

S. LOWE, PLAINTIFF IN ERROR,

VS.

THE STATE OF KANSAS, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

J. D. McBRIAN,
COUNTY ATTORNEY OF THE COUNTY OF CHAUTAUQUA, STATE OF KANSAS,
FOR DEFENDANT IN ERROR.

IN THE

SUPREME COURT OF THE UNITED STATES.

S. LOWE, PLAINTIFF IN ERROR,

VS.

THE STATE OF KANSAS, DEFENDANT IN ERROR.

No. 174.

BRIEF OF DEFENDANT IN ERROR.

The statement of the case as made in the brief of Plaintiff in error, is substantially correct as to the facts in issue, and I suppose the whole matter is purely a question of law.

Is the law upon which this case is based in conflict with the Constitution of the United States? I suppose this is really the only question to be determined.

There is, however, a preliminary question which I desire to raise, to wit: Can this question be raised by appeal, as is attempted in this case?

If the case is not appealable then the Court is without jurisdiction.

But if the case is properly before the Court, then it appears to me that the reasoning of Justice Brewer in the Ebenhack case, 17 Kansas 618, cited by Appellant's counsel, is unanswerable and is decisive of the case.

In that case, as in this, it was contended that a prosecuting witness who maliciously and without probable cause institutes criminal proceedings against one found innocent by the verdict of the jury could not be imprisoned for non-payment of a judgment against him for costs, because he has not had his day in court; and because such a proceeding is not due process of law, and is an infringement of the Constitution.

In the Ebenhack case, Justice Brewer, delivering the opinion of tne Court, says: "We do not consider the objections well taken. By coming into Court and filing his complaint he submits himself to the jurisdiction of the Court."

We might add that he does this knowing the provisions of the law as to his liability for costs.

See In re Ebenhack, 17 Kansas 618, and cases there cited.

In the case of The State vs. Ensign, 11 Nebraska 529, cited by counsel for appellant, I think the Court overlooked an important matter. In the opinion the Court says: "The mere failure to prove the charge made in a complaint is not conclusive evidence of want of probable cause, or of malice." And this seems to be the theory

upon which that Court held the provisions of their statute to be unconstitutional.

I may admit their premises, and deny their conclusion.

It is true a mere failure of proof of the charge does not conclusively show malice, or want of probable cause. But the good faith of the complaining witness, his motives, whether malicious or otherwise, are necessarily involved, and a proper subject of investigation by the jury, upon the evidence in the case; and if from all the evidence and all the surrounding circumstances, the failure of proof of the guilt of the defendant the jury find that the prosecution was instituted from malicious motives, and without probable cause, the complainant knowing all this at the time of making the complaint, has he not had due process of law, and fully had his day in Court?

I observe that the Supreme Court of Nebraska, in The State vs. Ensign, does not cite any authorities in harmony with their opinion. And I confess that I have been unable to find one.

Section 18 Chapter 83 of the General Statutes of Kansas, known as the code of procedure criminal, before justices of the peace, is the section construed by the Supreme Court of Kansas, in re Ebenhack, and held constitutional and valid.

And counsel for appellant seems to admit that, if it is constitutional then section 326 of Chapter 82, upon which the case stands, is also constitutional.

So it seems to me that it is wholly unnecessary for

me to cite any additional authorities to those already cited.

Appellant also complains of section 309 of the crimes and punishments act, of the Kansas statute, as being unconstitutional.

But so far as this case is concerned it is immaterial whether the provisions of this statute is constitutional or not.

It simply gives the jury the right in their discretion to decide the law and the facts submitted to them. There is no showing that they even exercised that right. It does not appear that they passed upon any questions of law.

But had the jury decided both the law and the facts in the case, the defendant in the action could not complain, unless the decision of the jury was wrong.

If the jury decided the questions of law, and decided them right, the appellant has no cause of complaint. And there is not even a suggestion as to how the appellant could possibly have been predjudiced by any decision of the jury upon any question of law in this case.

We think the judgment should be affirmed.

J. D. McBRIAN, County Attorney,
of Chautauqua County, Kansas.